CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1926

FIRST NATIONAL BANK OF COLUMBUS, GEORGIA, v. LEON ROCHA-MORA AND MAX TAUB, PARTNERS, DOING BUSINESS AS THE ASHEVILLE CANDY COMPANY.

(Filed 12 January, 1927.)

1. Bills and Notes—Negotiable Instruments—Actions—Parties—Statutes.

The holder of a negotiable instrument in due course for value may maintain an action thereon in his own name as the real party in interest, and a payment to him is a discharge of the instrument, C. S., 3032; but when the holder in due course by endorsement is a bank, and has received it only for collection, action on the instrument must be brought by the endorser. C. S., 446, 3017, 3018.

2. Same—Banks and Banking—Agencies for Collection—Principal and Agent.

Where a bank receives a negotiable bill of exchange from its depositor, and the instrument is endorsed to the bank, as in due course, the presumption raised by the statute is that the bank, among other things, was a purchaser for value, and a prima facie case is thereby raised sufficient to take the case to the jury, with the burden of the issue remaining with the bank, the plaintiff in the action.

3. Same—Evidence—Questions for Jury.

Evidence that the plaintiff bank received from its depositor a bill of exchange endorsed to it, under the custom of taking such instruments with the right to receive the depositor's check in the event of nonpayment, and without any knowledge of or inquiry into the financial responsibility of the payor, is sufficient evidence to take the case to the jury upon the question as to whether the bank accepted the instrument for collection only.

4. Instructions—Requests for Instructions—Appeal and Error—Objections and Exceptions.

An instruction that in general terms correctly applies the law of the case arising from the evidence, will not be held for reversible error, it being for the appellee to offer a prayer for special instructions going into the particulars complained of, and to except to the refusal of the court to give it.

APPEAL by plaintiff from *Stack, J.,* and a jury, at July Term, 1926, of BUNCOMBE. No error.

This was an action instituted by plaintiff against Leon Rochamora and Max Taub, partners, doing business as the Asheville Candy Company, to recover of defendants the sum of $1,000, alleged to be due on a bill of exchange or trade acceptance given by defendants to Kaufman Brothers, on 25 November, 1924, for the purchase of candy, payable 6 March, 1925. Plaintiff alleged it was endorsed "Kaufman Brothers—Sam Kaufman." The endorsement was denied by defendants.

It was alleged by plaintiff (paragraph 4 of the complaint): "That after said acceptance and said endorsement, before maturity, and for value, the plaintiff purchased said trade acceptance, and as such owner, forwarded same to Asheville for collection, and payment at maturity, but payment thereof was refused, and the same was on 6 March, 1925, duly protested for nonpayment; that demand has been made for payment, and payment refused, and there is due to the plaintiff the sum of one thousand dollars, with interest thereon from 6 March, 1925, by the defendants."

The defendants answer that the allegations of paragraph 2 of the complaint are untrue, as therein set forth, and are denied. "The defendants admit, however, that they signed a paper-writing substantially similar to that set forth in paragraph 2 of the complaint, but state further that any paper-writing signed by the defendants was signed upon an express agreement between the defendants and Kaufman Brothers, under which agreement the said Kaufman Brothers agreed to give credit to the defendants on said paper-writing for any defect in any goods shipped, and the defendants state that there was a defect in said goods, and that goods were not shipped which had been ordered by the defendants, and that the said Kaufman Brothers shipped other goods, which had not been ordered by the defendants, and are indebted to the defendants in at least the sum of eight hundred dollars ($800), which sum was to be credited on any paper-writing which may have been signed by the defendants under an express agreement in writing between the defendants and the said Kaufman Brothers."

Defendants answer paragraph 4 of the complaint, as follows: "The defendants are informed and believe that the allegations of para-

graph 4 of the complaint are untrue and are denied. The defendants admit that they have not paid a paper-writing substantially similar to that mentioned in paragraph 2 of the plaintiff's complaint, which was, as the defendants are informed and believe, sent on for collection by Kaufman Brothers and which was owned by Kaufman Brothers at the time it became due, for the reasons hereinbefore set forth. Defendants expressly deny that they are indebted to the plaintiff in any sum whatsoever."

The issues submitted to the jury and their answers thereto were as follows:

"1. Is the plaintiff the owner of the trade acceptance in due course as alleged in the complaint? Answer: No.

2. If so, in what amount, if any, is the defendant indebted to the plaintiff?"

There was a judgment signed in accordance with the verdict and plaintiff assigned numerous errors and appealed to the Supreme Court. The material facts and assignments of error will be considered in the opinion.

Merrimon, Adams & Adams for plaintiff.
Jones, Williams & Jones for defendants.

CLARKSON, J. "If you find that the plaintiff bought the paper, that is, in due course, as I have defined that term, and did not take it as an agent for collection, then your answer to the first issue would be 'yes'; if you do not so find, your answer to the first issue would be 'no.' If as purchaser in due course, if the plaintiff has satisfied you by the greater weight of the evidence of that, your answer to the first issue would be 'yes,' if not, and you find that the bank accepted it as a collecting agent, your answer to the first issue would be 'no.'" Plaintiff assigns error. The main controversy hinges around the charge as stated above as incorrect in law, and there was no sufficient evidence to support it. We think the charge correct, and that there was sufficient evidence to go to the jury to sustain it.

C. S., 3108: "A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money or order or to bearer." C. S., 3114.

In the present action the "bill of exchange" or "trade acceptance," was a negotiable instrument. This is conceded on the record. *Sherrill v. Trust Co.,* 176 N. C., 591.

The issue submitted to the jury: "Is the plaintiff the owner of the trade acceptance in due course, as alleged in the complaint?" we think

the proper one under the pleadings. The plaintiff alleged that it, in due course, purchased the trade acceptance and as such owner forwarded same to Asheville for collection, etc. The defendants deny that plaintiff purchased the paper-writing, and allege that Kaufman Brothers was the owner at the time it became due and was sent on by them for collection. Defendants expressly deny that they are indebted to plaintiff in any sum.

Brannan's Negotiable Instrument Law, 4 ed. (1926), sec. 51: "The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument." This is the exact language of our C. S., 3032. In construing this section, the learned author, at p. 352, says: "Although The Code requires an action to be brought in the name of the real party in interest, yet under sec. 51, N. I. L., a holder even though he be a holder only for collection, may sue in his own name." And on p. 353: "In *Third Nat. Bank v. Exum,* 163 N. C., 199, 79 S. E., 498, *S. c.,* sec. 37, the Court in saying that an endorsee for collection cannot maintain an action, citing an old case, evidently overlooked secs. 51, 36 and 37 of the N. I. L." C. S., 3017-8; 36 N. I. L. is C. S., 3017; 37 N. I. L. is C. S., 3018.

Under our Code of Civil Procedure, "Every action must be prosecuted in the name of the real party in interest," etc. C. S., 446.

Construing the sections of the Negotiable Instrument Law referred to with the section under Civil Procedure, that says every action *must be prosecuted* in the name of the *real party in interest,* we think C. S., 446, is mandatory and compelling. We think the decision of *Bank v. Exum,* 163 N. C., 199, correct in principle and founded on a just and reasonable interpretation of the statutes applicable and cognate. To say a collecting agency, because it is a bank, can sue in its own name would be to say that any attorney or any kind of collecting agent can likewise enter suit by reason of the agency. We do not think our statute allows this construction as to favoritism. The contrary construction would permit the real owner of the instrument to defeat all equities of the maker by simply turning it over to an agent for collection. "Logic of words should yield to the logic of realities." *Brandeis, J.,* dissenting in *Di Santo v. Penn.,* U. S. Supreme Court opinion, 3 January, 1927.

Allen, J., in *Worth Co. v. Feed Co.,* 172 N. C., 335, speaking to the question involved, says, at p. 341: "The intervening bank was the holder of the draft duly endorsed, and as there is neither allegation nor proof that the title of the feed company, which negotiated the draft, was defective (Rev., sec. 2204), (C. S., 3036), the only question presented by the appeal is whether his Honor correctly held, *as matter of law, that the bank held the draft for collection and not as a purchaser for value.* If it was a *purchaser for value,* the draft became the property of the

bank, and the proceeds could not be attached in the hands of the Murchison Bank as the property of the feed company; but if a *mere collecting agent,* the proceeds would belong to the feed company and be the subject of attachment. (Italics ours.) The holder of a negotiable instrument duly endorsed (and it is not contended that the draft was not negotiable) is, under the statute (Rev., sec. 2201), (C. S., 3033) prima facie a purchaser for value, in good faith, before maturity, and without notice of any defect in the title of the person negotiating it. If the instrument is negotiable, the holder may, upon proof of the endorsement, rest his case, because the statute says, under such conditions and nothing else appearing, that he is a purchaser for value. *Moon v. Simpson,* 170 N. C., 336, and cases cited. In this last case the Court says: 'The burden is upon the holder of a negotiable instrument payable to order, which has been endorsed, to prove the endorsement (*Tyson v. Joyner,* 139 N. C., 69), and when he does so he is deemed prima facie to be a holder in due course (Rev., sec. 2208), (C. S., 3040), that is, he is deemed prima facie to be a purchaser in good faith for value, before maturity, and without notice of any infirmity in the instrument or of any defect in the title of the person negotiating it. Revisal, sec. 2201 (C. S., 3033). He is not required to prove that he paid value for the instrument, as the statute furnishes this evidence for him. The following authorities and others sustain this position. *Mfg. Co. v. Tierney,* 133 N. C., 630; *Evans v. Freeman,* 142 N. C., 61; *Trust Co. v. Bank,* 167 N. C., 261; *Bank v. Roberts,* 168 N. C., 475' "; *Bank v. Felton,* 188 N. C., at p. 386.

In *Worth Co. v. Feed Co., supra,* at p. 342, it is said: "The rule prevails with us, and it is supported by the weight of authority elsewhere, that if a bank discounts a paper and places the amount, less the discount, to the credit of the endorser, with the right to check on it, and reserves the right to charge back the amount if the paper is not paid, by express agreement or one implied from the course of dealing, and not by reason of liability on the endorsement, the bank is an agent for collection and not a purchaser. *Packing Co. v. Davis,* 118 N. C., 548; *Cotton Mills v. Weil,* 129 N. C., 452; *Davis v. Lumber Co.,* 130 N. C., 176; and *Bank v. Exum,* 163 N. C., 202. . . . (p. 343). Was it the mutual understanding and intention that the title should pass unconditionally to the bank, with no right to charge back except by reason of endorsement, or was it the intention of the parties that the title should only pass conditionally, and that credit should be given temporarily for the convenience of the parties, with the right arising by express or implied agreement to charge back? If the first, the bank would be a purchaser for value and the owner; and, if the second, it would be an agent for collection. In passing upon the question of the intention of the parties, it is compe-

tent to consider the course of dealing, the rate of discount, the state of the account, and other relevant circumstances."

The plaintiff contends: (1) That on all the evidence it is entitled to recover on a peremptory instruction in its favor; (2) that it is entitled to recover because the defendant did not introduce evidence of defenses against Kaufman Brothers, the original holders of the paper. We think neither position tenable, under the facts and circumstances of the present action.

"If the bank in truth held the notes for collection, it could not maintain this action. *Abrams v. Cureton,* 74 N. C., p. 523." *Bank v. Exum, supra.* If held for collection, the plaintiff is not the real party in interest under our Statute of Civil Procedure. *Chapman v. McLawhorn,* 150 N. C., 166; *Martin v. Mask,* 158 N. C., p. 436-442.

In *Finance Co. v. Cotton Mills Co.,* 187 N. C., at p. 237, it is said: "The fact that the officers of the Finance Company testified that its company is the owner of the note, and they purchased it in due course bona fide for value and before maturity, is not conclusive if the Mills Company should show by facts and circumstances to the contrary. The weight of the evidence, pro and con, was for the jury. . . . (p. 239.) All this and other matters of the dealings between the Finance Company and the Truck Company was more than a scintilla of evidence to go to the jury, its weight is for them to determine on this aspect of the case whether the bank is an agent for collection and not a holder or purchaser in due course."

In the present action the bank introduced the trade acceptance, proved its execution by defendants and endorsement by Kaufman Brothers—this made out a prima facie case, which it was entitled to have submitted to the jury, that plaintiff was the holder or purchaser in due course. The defendants contend that from the facts and circumstances of the case and plaintiff's evidence, there was sufficient evidence, more than a scintilla, for the jury to consider and pass on that the plaintiff bank took the trade acceptance merely as an agent for collection and not as a purchaser or holder in due course.

Some of the facts and circumstances relied on by defendants: The following question was asked of and answered by the vice-president of the plaintiff bank: "Q. It was your custom when you took one of these drafts from Kaufman Brothers to credit them with the net amount, and when the acceptance was not paid at maturity, you reserved the right to charge it back to them, didn't you? Answer: Not necessarily; we usually send out and get a check for it, that is when we want them to take it up." The vice-president of the plaintiff bank also testified as follows: "I do not remember making any inquiry as to the financial standing of the Asheville Candy Company before the purchase of the

acceptance, but I looked up their rating afterwards in Dun's and found them to be well rated."

Defendants contend that this evidence is sufficient to show that the bank was not making an outright purchase of the trade acceptance, but was handling it as an agent for collection for the convenience of Kaufman Brothers; that the usual course of dealing between the bank and Kaufman Brothers was to take a paper of this character, collect it if possible, and if the paper for any reason was not paid, to return it to Kaufman Brothers and charge it back or collect it from Kaufman Brothers as a matter of course, not by reason of the endorsement, but as a matter of custom and general course of dealing; so that if the paper was paid, no further entries need be made and no further charges against Kaufman Brothers. In addition, it is a strong circumstance that the bank in Columbus, Georgia, did not make any investigation of the affairs of a concern in Asheville before taking the paper. Ordinary prudence would have dictated that the bank make an investigation of a concern whose paper it was buying, and contends that no bank would buy outright paper of a concern in a distant city and state without making an investigation of the concern for the purpose of ascertaining if the paper was good. This kind of evidence tended to show that the plaintiff bank did not purchase the paper outright, but took it merely as an agent for collection for Kaufman Brothers. There were other circumstances connected with the transaction favorable to defendants' view. We think the evidence, under all the facts and circumstances of this case, sufficient to be submitted to the jury and borne out by decisions in similar cases: *Worth Co. v. Feed Co.,* 172 N. C., 335; *S. c.,* 173 N. C., 711; *Moon v. Milling Co.,* 176 N. C., 407; *Brooks v. Mill Co.,* 182 N. C., 258; *Mangum v. Grain Co.,* 184 N. C., 181; *Sterling Mills v. Milling Co., ibid.,* 461; *Finance Co. v. Cotton Mills Co.,* 187 N. C., 233; *Bank v. Monroe,* 188 N. C., 446. This whole matter is thoroughly discussed and annotated, including the North Carolina decisions, in 42 A. L. R., p. 487.

The burden of the issue was on plaintiff, and the court below so charged correctly. *Cotton Oil Co. v. R. R.,* 183 N. C., 95; *Hunt v. Eure,* 189 N. C., 482; *McDaniel v. R. R. Co.,* 190 N. C., 474. To be sure, a prima facie case by the proof of the execution of the trade acceptance by defendants, its endorsement by Kaufman Brothers, and the possession of the trade acceptance by plaintiff bank, made out a prima facie case that plaintiff was the holder or purchaser in due course and not for collection. If plaintiff desired an instruction as to the effect of the prima facie evidence, it ought to have submitted prayer for specific instructions.

"Where the instruction is proper so far as it goes, a party desiring a more specific instruction must request it." See N. C. cases Anno. 10 S. E. Digest (N. C. ed.), sec. 256, p. 12551; *Simmons v. Davenport,* 140 N. C., 407; *Gay v. Mitchell,* 146 N. C., 509; *Hardy v. Lumber Co.,* 160 N. C., 113; *Webb v. Rosemond,* 172 N. C., 848; *Lumber Co. v. Lumber Co.,* 176 N. C., 500-2; *Baker v. Winslow,* 184 N. C., 1, 8.

The jury, under proper instructions, found for the defendant. They heard the evidence and found that plaintiff was not the owner of the trade acceptance in due course. On the whole record, we can find

No error.

GEORGE LOCKHART v. PILOT LIFE INSURANCE COMPANY, AND FLORENCE HAILEY, INTERPLEADER.

(Filed 12 January, 1927.)

1. Insurance, Life—Policies—Contracts—Vested Rights.

Where a life insurance policy is in full force at the time of the death of the insured, and issued in favor of a designated beneficiary by name, such beneficiary having acquired a vested right under the policy contract may recover thereon as against the right of another to whom the policy has on its face been attempted to have been changed, there being no evidence that the policy itself authorized a change of this character to be made, or that the original beneficiary had thereto assented.

2. Same—Change of Beneficiary—Evidence.

Where a policy of life insurance has matured upon the death of the insured, and on its face the beneficiary appears to have been changed, the interpleader, relying upon this change, has the burden of proof to establish it.

3. Same—Burden of Proof.

Where a life insurance company acknowledges that it is obligated for the payment of its policy of insurance, but that it is claimed by two different persons as beneficiary, and one of them interpleads in the action, and founds her right to recover on the ground that the policy contract had been changed to her as the beneficiary, the burden rests upon her to establish her right.

APPEAL by plaintiff from *Lane, J.*, and a jury, at August Term, 1926, of UNION. New trial.

Plaintiff brought this action against defendant to recover $300 on an insurance policy, No. L51477, issued by it 18 August, 1924, on the life of plaintiff's wife, Millie Lockhart. The policy was made payable to plaintiff on the death of his wife, who died 1 January, 1926. Due proof of death, in accordance with terms of policy, was furnished the defendant insurance company. The plaintiff kept all the premiums

paid, as required by the policy, and the policy was in full force and effect at the death of Millie Lockhart. Demand was duly made by plaintiff on defendant for the amount of the policy, $300. These facts are not disputed by the defendant insurance company, but in its further answer it says: "That prior to the death of the said Millie Lockhart, the beneficiary in said policy was changed or attempted to be changed to Florence Hailey, a sister of the said Millie Lockhart, and the said change in beneficiary was duly endorsed on the policy issued on the life of the said Millie Lockhart, and that the said Florence Hailey has made demand upon this defendant for the payment of said $300, the amount of the policy, to her. That the defendant admits that it is liable in the amount of three hundred dollars, the amount of said policy, either to George Lockhart the plaintiff, or to Florence Hailey, the other claimant, and that it is ready, willing and anxious to pay said amount to the proper party, but that demand has been made, both by the plaintiff and the said Florence Hailey, each claiming as beneficiary under said policy, and this defendant is therefore advised and believes that it is necessary that the said Florence Hailey should be made a party to this proceedings, so that she may come in and assert her rights in said cause, so that the amount of the policy may be paid to the party entitled thereto."

Florence Hailey intervenes or interpleads, and says: "Prior to her death the said Millie Lockhart, with the consent of the Pilot Life Insurance Company, changed the beneficiary named in said policy, to wit, the plaintiff George Lockhart, to this interpleader, and this interpleader is the beneficiary of said policy and is entitled to the proceeds thereof."

In answer to the interplea, the plaintiff alleges: (1) Mental incapacity on part of Millie Lockhart and undue influence and fraud on part of Florence Hailey to induce Millie Lockhart to change the policy; (2) an agreement with his wife as to a policy on his life payable to her at his death; "and he, the plaintiff was to pay all the premiums, assessments or dues on said policy so long as she might live with the distinct understanding that the policy on the life of his said wife should be paid to him upon the death of his said wife, and he did keep all the assessments, dues or premiums on both of said policies paid to the death of his said wife in keeping with his said agreement, and therefore has the right to the benefit of said policy as the defendant should well know."

On the trial the court below ruled that plaintiff proceed to prove his case—to this there was no exception by plaintiff. The plaintiff introduced the complaint and answer showing admissions as before set forth. This evidence was admitted against the insurance company, but not against the intervener. The plaintiff rested.

Florence Hailey, the intervener, testified: That she was the person to whom the policy in question was alleged to have been changed; that she

never received anything from the defendant on said policy. She introduced paragraph one of the defendant's further defense and further answer, as follows: "That it is true that on 18 August, 1924, it issued a policy in the amount of $300 on the life of Millie Lockhart, payable to George Lockhart, her husband, as beneficiary, and that all premiums due on said policy were paid up to the time of the death of Millie Lockhart; the defendant further says, however, that prior to the death of the said Millie Lockhart, the beneficiary in said policy was duly changed or attempted to be changed to Florence Hailey, a sister of the said Millie Lockhart, and that the said Florence Hailey has made demand upon this defendant for the payment of the said $300, the amount of the policy, to her." The court stated that this paragraph was admitted as against the defendant, but not as against the plaintiff. Interpleader Florence Hailey rested.

The plaintiff tendered issue as follows: "In what amount, if any, is the defendant, Pilot Insurance Company, indebted to the plaintiff?"

The plaintiff requested the court to charge the jury that if they believed the evidence, they would answer the above issue submitted by him "$300, with interest from 2 March, 1926, until paid." The court refused to submit the issue tendered or to give the instruction, to which ruling the plaintiff excepted and assigned error.

The court submitted to the jury the issue, as follows: "In what amount, if any, is the Pilot Life Insurance Company indebted to the interpleader, Florence Hailey?"

The court charged the jury that if they believed the evidence, they should answer the issue submitted that the defendant was indebted to the interpleader in the sum of $300 with interest from 1 January, 1926. This was the only instruction given by the court to the jury. To the court's submitting the issue and instruction, the plaintiff excepted and assigned error.

The jury answered the issue according to the court's instruction in favor of the interpleader, to which plaintiff excepted and assigned error. Judgment was rendered on the verdict and plaintiff appealed to the Supreme Court.

R. B. Redwine for plaintiff.
Vann & Milliken for intervener.

CLARKSON, J. The defendant, Pilot Insurance Co., introduced no evidence, but admitted that it owed the amount of the policy either to plaintiff or the intervener. It made no appeal to this Court. The policy of insurance was not introduced in evidence by any of the litigants. Plaintiff's main contentions are: "That he was entitled to an instruction that upon the whole evidence he should recover: (a) Having

proved by admission of the defendant that the policy was issued; (b) that the plaintiff was the beneficiary; (c) that the insured was dead and the policy was in full force and effect; (d) that this established a vested right in the plaintiff as beneficiary and there being no proof that the insured, much less the defendant company, had reserved any right to change the beneficiary and such attempt, if any was made, was void; (e) that the only evidence the interpleader offered was not admitted against the plaintiff and so announced by the court."

The intervener contends: "The main question in this case is that of identity of beneficiary at the time of insured's death. The plaintiff proved that *'at the time of the issuance of the policy'* he was beneficiary, and stopped his proof there."

We think the only question involved in the appeal—who was entitled to the $300.00 on the death of plaintiff's wife, Millie Lockhart? The defendant Insurance Company admitted the policy, when issued, was payable on the death of Millie Lockhart, to plaintiff. So far as plaintiff's rights are concerned there was no evidence introduced to show that the company had any provision in the policy to change the beneficiary. The mere fact that the Insurance Company alleges "that prior to the death of the said Millie Lockhart the beneficiary in said policy was duly changed or attempted to be changed to Florence Hailey," etc., cannot affect the plaintiff's vested right without proof.

There is no allegation or proof in the record by the Insurance Company or the intervener, to show that the Insurance Company had a right, under the provisions of the policy, to change the beneficiary from plaintiff in favor of the intervener, Florence Hailey.

In *Wooten v. Order of Odd Fellows,* 176 N. C., at p. 56, it is held: "The general rule is that the right to a policy of insurance, at least to one of the ordinary character, and to the money which may become due under it, vests immediately, upon its being issued, in the person who is named in it as beneficiary, and that this interest, being vested, cannot be transferred by the insured to any other person *(Central National Bank v. Hume,* 128 U. S., 195) without his consent. This does not hold true, however, when the contract of insurance provides for a change of the beneficiary by the insured, or such a right arises in some other way, for in such a case the right of the beneficiary vests conditionally only, and is subject to be defeated by the terms of the very contract, or instrument, which created it, and is destroyed by the execution of the reserved power. These principles, we take it, are well settled by the highest authority and great weight of judicial opinion," citing numerous cases.

It is well settled by a long line of decisions that the burden is on the intervener and he or she is entitled to but one issue: "Does the fund belong to her?" *Maynard v. Ins. Co.,* 132 N. C., p. 711.

In *Hill v. Patillo,* 187 N. C., at p. 532, it is held: "In such a proceeding the intervener is not called on or required, and indeed he is not permitted to question the validity of plaintiff's claim against defendant, nor to file any answer thereto which denies or tends to deny its validity. On the contrary, the intervener has himself become the actor in the suit and on authority is restricted to the issue whether his claim of right and title is superior to that of the original plaintiff. *Mitchell v. Talley,* 182 N. C., 683; *Maynard v. Ins. Co.,* 132 N. C., 711; *Cotton Mills v. Weil,* 129 N. C., 452." *Sitterson v. Speller,* 190 N. C., p. 192.

The fact that the court below put the burden on plaintiff and he made no exception, is immaterial under the facts in this case. The laboring oar was on the intervener to show title to the insurance money. From the evidence, plaintiff had vested interest in the fund and the burden was on the intervener to show, by competent evidence, that it was divested and she was entitled to it. This was not done and the charge of the court below cannot be sustained.

In *Lanier v. Insurance Company,* 142 N. C., at p. 18, it is held: "Under the terms of the policy sued on, plaintiff had such an interest as entitled her to recover upon the death of the insured if the premiums had been paid and the policy was otherwise in force, unless the defendant company could show it had been lawfully surrendered by her consent, or that the insured had duly and legally exercised the power reserved in the clause quoted, entitled 'change of beneficiary.' . . . To successfully resist a recovery upon such ground the burden of proof is on defendant to show a strict compliance by the insured with the provisions of such clause in the policy before the rights of the plaintiff could be divested without her consent."

In its answer the insurance company is practically a stakeholder, admitting it owed either the plaintiff or the intervener. The burden was on the intervener.

For the reasons given there must be a

New trial.

STATE v. JIM WALDROOP.

(Filed 12 January, 1927.)

1. Homicide—Justifiable Homicide—Self-Defense—Questions for Jury.

Where one, without blame on his part, is assaulted by another, and in the exercise of ordinary firmness he actually apprehends or has reasonable grounds to apprehend that his life is in danger, or he is in danger of great bodily harm, he may use such force as reasonably appears to him to be

necessary to save his life or to protect himself from great bodily harm, the necessity real or apparent being for the jury to determine upon the evidence; and should the jury so find the homicide is excusable.

2. Same—Instructions—Appeal and Error.

Where there is evidence that the prisoner on trial for a homicide was justifiable in taking the life of the deceased, it is reversible error for the judge to insufficiently charge upon the principle of self-defense.

3. Instructions—Conflict—Appeal and Error.

Where an instruction by the court to the jury is conflicting upon a material point, a new trial will be granted on appeal.

STACY, C. J., and CLARKSON, J., dissenting.

APPEAL by defendant from *Harding, J.*, at August Term, 1926, of CHEROKEE. New trial.

The defendant was indicted in the usual form for the murder of Sam Burgess, but the State did not ask for his conviction of murder in the first degree. He was convicted of manslaughter and from the judgment pronounced he appealed, assigning as error the following instructions on the question of self-defense.

"A man cannot just make up his mind that he is going to be killed and haul off and kill somebody—he has got to have reasonable grounds for killing, and the burden is on him to show you that at the time he fired that pistol that he not only believed that he was going to be killed, but that his belief and fear were based on reasonable grounds, and if he has satisfied you that he had reasonable grounds to believe he was about to be killed, and in good faith did believe he was about to be killed, both elements have to enter into it—I may have reasonable grounds to believe I am going to be killed; if I don't believe it and haul off and shoot anyway, I am guilty of murder in the second degree, that is, if I shot with the intention to kill and do kill, or I may have reasonable grounds to believe there is danger, when there is no danger, but if I believe there is danger and shoot and kill, I would be justified in doing so. I may see certain demonstrations, hear certain accusations, or hear certain words that would be reasonable grounds to lead me to believe a man was going to kill me right then, and yet the man might have no such thought, no thought of doing me any injury at all. So it is not whether the deceased intended to kill defendant if he got a chance, or whether he intended to assault him or whether he wanted to do it, that is not the issue in the case. Did the force, the words, the things that took place there immediately before the firing of the pistol by the defendant, were they such as to give the defendant reasonable grounds to believe that he was about to be killed, and then did the defendant actually in good faith believe it? If he did, then he had the right to use such force as appeared to him at that time to be reasonably

necessary to protect himself, and if he has satisfied you of that, that he used only such force as appeared to him at that time to be reasonably necessary to protect himself, it would be your duty to acquit him, but if he has failed to satisfy you that he did have reasonable grounds to believe that he was about to be killed, and did believe it, and did not use such force for that purpose, but because of the things done and said he was moved by the heat of passion, the impulse of anger and without malice, he fired and shot the deceased, then he would be guilty of manslaughter, but the burden is on the defendant to satisfy you that he shot under such circumstances, whether you convict him of manslaughter or whether you convict him of murder in the second degree or whether you acquit him, he having admitted the killing with a pistol, that is murder in the second degree, and the burden shifts to him to satisfy you that he killed in justification. If he has so satisfied you, you will acquit him; if he has failed to so satisfy you, but has rebutted the presumption of malice, it would be your duty to convict him of manslaughter. You may retire, gentlemen, and render your verdict."

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Moody & Moody for defendant.

ADAMS, J. The record discloses evidence tending to establish each of the three degrees of felonious homicide as well as the defendant's right to acquittal on the ground of self-defense. There was a verdict for manslaughter; and the exception noted calls for an inspection of the instruction complained of with a view to ascertaining whether it was circumscribed or restricted to the prejudice of the defense.

So often has the Court elucidated the principle of self-defense as it prevails here that a review of the authorities on the subject would involve a tedious and superfluous task. The salient features of the principle as deduced from our decisions may be stated in concise terms. If A. is assaulted and by reason of the assault, while free from blame in the matter and in the exercise of ordinary firmness, he actually apprehends and has reasonable ground for apprehending that his life is in danger or that he is in danger of great bodily harm he has a right to use such force as is necessary or such force as reasonably appears to him to be necessary to save his life or to protect himself from great bodily harm—such necessity real or apparent to be determined by the jury upon all the facts and circumstances as they reasonably appear to him at the time; and if under these conditions he takes the life of his assailant the homicide is excusable. Whether he actually apprehends loss of life or great bodily harm, whether he has reasonable cause for

such apprehension, whether under the circumstances as they appear to him it is necessary or apparently necessary to take human life—these are questions for the jury to determine from all the evidence. *S. v. Harris,* 46 N. C., 190; *S. v. Dixon,* 75 N. C., 275; *S. v. Barrett,* 132 N. C., 1005; *S. v. Clark,* 134 N. C., 698; *S. v. Blackwell,* 162 N. C., 672; *S. v. Johnson,* 166 N. C., 392; *S. v. Brinkley,* 183 N. C., 720; *S. v. Johnson,* 184 N. C., 637.

It may become necessary for the trial court in explaining the law of self-defense to enforce the exception to the general rule that a deadly weapon may not be used to repel a simple assault, or to draw the distinction between a felonious and an ordinary assault, or to recognize the difference between fighting willingly in self-defense and entering into a combat willingly but with legal provocation; but these principles are of course easily to be applied. *S. v. Pollard,* 168 N. C., 116; *S. v. Hill,* 141 N. C., 769; *S. v. Hough,* 138 N. C., 663; *S. v. Blevins, ibid.,* 668; *S. v. Dixon, supra.*

In our opinion the instruction to which the defendant excepts falls short of that to which he was entitled. The exception is addressed not so much to an erroneous statement of the principle as far as it goes as to a defect or a material omission in the instruction. It is said in the first paragraph that the burden was on the defendant to show that at the time he fired the pistol he not only believed he was going to be killed but that his fear had a reasonable basis; that if he had satisfied the jury that there was reasonable ground for his believing that he was about to be killed and in good faith did believe it, he was justified in taking the life of the deceased; that there must have been both elements, the belief and a reasonable cause for it. The instruction proceeds: "So it is not whether the deceased intended to kill the defendant if he got a chance, or whether he intended to assault him or whether he wanted to do it—that is not the issue in this case. Did the force, the words, the things that took place there immediately before the firing of the pistol by the defendant, were they such as to give the defendant reasonable grounds to believe that he was about to be killed, and then did the defendant in good faith believe it? If he did (i. e., if he believed and had good cause to believe that he was about to be killed) then he had the right to use such force as appeared to him at that time to be reasonably necessary to protect himself, and if he has satisfied you that he used only such force as appeared to him at that time to be reasonably necessary to protect himself it would be your duty to acquit him; but if he has failed to satisfy you that he did have reasonable grounds to believe that he was about to be killed and did believe it and did not use such force for that purpose, but because of the things done and said he was moved by the heat of passion, the impulse of anger,

and without malice he fired and shot the deceased, then he would be guilty of manslaughter."

Under this instruction the defendant's right of self-defense was made to depend entirely on a reasonable belief that he was about to be killed; throughout, this is the underlying thought—the reasonable apprehension of death. The inference is that in the absence of such apprehension the homicide would be manslaughter at least. The defect in the instruction is the omission of any reference to the apprehension of bodily harm; still this is as much an element of defense as the apprehension of death. The question was not exclusively whether the defendant reasonably believed that his life was in danger, but also whether he reasonably apprehended the infliction of great bodily harm. The exact point was decided in *S. v. Matthews,* 78 N. C., 523, 538. There the Court said: "The instructions were erroneous in other particulars. The judge said: 'If it appeared from the circumstances of the case that Matthews had reasonable ground to apprehend that his life was in imminent danger he was justified in taking the life of his assailant, but there must be a necessity for taking life from the fierceness of the assault before he could be excused on the ground of self-defense.' The judge omitted here to say that Matthews must have believed in the reality of the danger, and he omitted also a much more important portion of the rule which he undertook to lay down. It is said in all the authorities, and cannot be doubted, that if a man who is assailed believes and has reason to believe that, although his assailant may not intend to take his life, yet he does intend and is about to do him some enormous bodily harm, such as maim for example, and under this reasonable belief he kills his assailant, it is homicide *se defendendo* and excusable."

It is true that in the preceding paragraph his Honor told the jury that as the use of the pistol raised a presumption of malice the burden was on the defendant to satisfy the jury that he shot without malice, thereby reducing the homicide to manslaughter, and to show that he shot the deceased in self-defense, "that is, having reasonable grounds to believe and did believe that he was about to be killed or to receive great bodily harm from the hands of the deceased." But in the application of the principle the element of bodily harm was left out and the right of self-defense as we have said, was made to turn on the reasonable apprehension of death. Even if this paragraph be treated as an application of the correct rule, still the instruction complained of is inconsistent with it and in substance the two are contradictory—one including both elements and the other only one. "It is well settled that when there are conflicting instructions upon a material point a new trial must be granted, as the jury are not supposed to be able to determine

when the judge states the law correctly or when incorrectly. We must assume in passing upon the motion for a new trial that the jury were influenced in coming to a verdict by that portion of the charge which was erroneous." *Edwards v. R. R.*, 132 N. C., 99; *S. v. Barrett, supra.*

For error in the instruction given a new trial is awarded.

New trial.

STACY, C. J., and CLARKSON, J., dissenting: The law as stated in the Court's opinion is not questioned, but we disagree with the interpretation placed upon the instruction held for error, when viewed in the light of the whole charge.

J. B. KILLIAN, ADMINISTRATOR OF ROY KILLIAN, DECEASED, v. J. HANNA, C. V. DEVAULT, W. H. LITTLE AND GEORGIA CASUALTY COMPANY.

(Filed 12 January, 1927.)

Actions—Misjoinder—Causes of Action—Insurance—Release—Fraud—Pleadings—Demurrer—Statutes.

Where the complaint alleges two causes of action, one against a defendant for negligence in proximately causing the injury in suit, and the other against an indemnity company whose policy of insurance covers the accident, and certain of its employees, for fraudulently obtaining a release from liability set up as a defense: *Held*, though a recovery may not be had against the defendants under the second alleged cause of action, they are necessary parties to the same cause of action, and a demurrer for misjoinder of parties and causes of action is bad. C. S., 456, 507, 535.

APPEAL by defendants from *Lane, J.*, at January Term, 1926 of CATAWBA (in Chambers, Morganton, N. C., 31 May, 1926). Affirmed.

The material facts will be stated in the opinion.

A. A. Whitener, Louie A. Whitener, T. Manly Whitener and A. D. MacLean for plaintiff.

Chas. A. Jonas and W. C. Feimster for defendants.

CLARKSON, J. This is an action for actionable negligence and to set aside a release alleged to have been procured by fraud, brought by J. B. Killian, administrator of Roy Killian. Two causes of action are set forth in the complaint:

(1) The first cause of action is against the defendant, J. Hanna, for damages, who it is alleged in the complaint, through gross negligence and reckless driving, which was the proximate cause, killed Roy Killian,

plaintiff's intestate, at the highway intersection in the village of Chocowinity, Beaufort County, N. C., on or about 6 November, 1925.

(2) The second cause of action is a repetition of the first cause of action for damages against the defendant, J. Hanna, for the negligent killing of plaintiff's intestate and against all the defendants for alleged fraud. The defendant, J. Hanna, had indemnity insurance against loss in defendant Georgia Casualty Co. It is alleged through fraud, in which all the defendants actively participated, with knowledge of the facts—gross negligence and reckless driving—as to how plaintiff's intestate was killed, they had the plaintiff, an illiterate man who could neither read nor write, to qualify as administrator and take $500 as a contribution or donation to the family of the deceased, which was tendered back and the release or receipt asked to be canceled, which turned out to be in full settlement of liability. All the allegations of fraud are fully alleged and set forth *(Stone v. Milling Co.,* 192 N. C., 585).

The defendant, Hanna, demurs to the complaint on the ground: (1) "The complaint does not set forth facts sufficient to constitute a cause of action against this defendant in the second alleged cause of action"; (2) misjoinder of causes; (3) misjoinder of parties.

The other defendants demur: (1) That the complaint does not set forth facts sufficient to constitute a cause of action; (2) that there is a misjoinder of causes of action; (3) that there is a misjoinder of parties defendant. We think that none of the grounds of the demurrers can be sustained.

In the first cause of action, J. B. Killian, plaintiff administrator, alleges an action for damages against J. Hanna for actionable negligence for the death of his intestate. The facts are fully set forth. This cause of action is not demurrable. In the second cause of action plaintiff anticipated that defendant, J. Hanna, and the defendant, Georgia Casualty Co.—Hanna having indemnity insurance against loss in the company—and the other defendants, agents of Georgia Casualty Co., C. V. DeVault and W. H. Little, all of whom it is alleged were active in getting an alleged release from plaintiff administrator, would set this so called release up in the answer as a bar to the action. Plaintiff alleges this release was obtained by fraud on the part of all the defendants, and asked that it be canceled. If the release was procured without fraud, this ends plaintiff's cause of action for actionable negligence. If it was procured by fraud, then plaintiff proceeds with his actionable negligence cause of action against J. Hanna.

In *Griffin v. Baker,* 192 N. C., 298, it is said: "A demurrer to a pleading admits the facts stated therein for the purpose of passing

upon the questions raised by demurrer. On demurrer a complaint will be sustained if its allegations constitute a cause of action or if facts sufficient for this purpose are logically inferable therefrom under a liberal construction of its terms." *Blackmore v. Winders,* 144 N. C., p. 212, and cases cited.

C. S., 456, is as follows: "Any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a *necessary party* to a *complete determination* or settlement of the questions involved," etc.

C. S., 507. "The plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of: (1) The same transaction, or transaction connected with the same subject of action; (3) injuries with or without force to person or property. . . . But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated."

C. S., 535, is as follows: "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties."

In *Sewing Machine Co. v. Burger,* 181 N. C., at 247, it is said: "One of the most important purposes of the adoption of The Code system of pleading was to enable parties to determine and settle their differences in one action. The law favors the ending of litigation, and frowns upon the multiplicity of suits. Hence, whenever possible, in the construction of statutes, this wise and wholesome policy should be observed." *Quarry Co. v. Construction Co.,* 151 N. C., p. 345; *Worth v. Trust Co.,* 152 N. C., p. 242; *Wadford v. Davis,* 192 N. C., p. 484.

In *Chemical Co. v. Floyd,* 158 N. C., at p. 461, where many cases are cited, there was held no misjoinder of parties defendant and causes of action. The facts in that case are "The cause of action is the recovery of the value of the property misappropriated, and one of the remedies sought to be enforced is the setting aside of certain deeds alleged to have been executed fraudulently by one of the defendants. . . . (p. 462) to join a cause of action on a note of whom it was alleged the debtor had executed a fraudulent deed *(Bank v. Harris,* 84 N. C., 206)."

In *Carswell v. Talley,* 192 N. C., p. 37, the facts were: "Civil action by the receiver of the Charlotte Jiffy Company, an insolvent corporation, to recover of the defendants, directors and sole stockholders of said insolvent corporation, damages for the alleged negligent and reckless management of the company's business by the defendants,

and to set aside a deed, alleged to have been made by virtue of an order entered in a friendly suit brought by Flora M. Kriminger against D. E. Kriminger for the purpose of having land owned by D. E. Kriminger in his individual right converted into an estate by the entirety by conveying the title to the two as husband and wife, with the intent to hinder, delay and defraud the creditors of the said D. E. Kriminger, etc. A demurrer was interposed by the defendants on the ground of a misjoinder of both parties and causes of action. From a judgment overruling the demurrer, the defendants appeal." The judgment was sustained under authority of *Chemical Co. v. Floyd, supra,* and *Robinson v. Williams,* 189 N. C., 256, and cases there cited.

On the question of misjoinder of parties defendant, the defendants cite the following cases: *Clark v. Bonsal,* 157 N. C., 270; *Hensley v. Furniture Co.,* 164 N. C., 148; *Newton v. Seeley,* 177 N. C., 528. The above cases decide that the assured (employer) must actually sustain a loss before an action will lie upon the indemnifying policy, as this is expressly required by the terms. This principle does not apply here. The defendant Casualty Co., with the other defendants, are being sued to have an alleged release set aside for fraud. If this is done, the defendant Casualty Co. would not be subject to any judgment that plaintiff may recover in the present suit against Hanna, under the terms of the policy. See *Harrison v. Transit Co.,* 192 N. C., p. 545.

Shore v. Holt, 185 N. C., 313, cited by defendants, is not applicable: "Charles Shore is joined as a coplaintiff with his wife, and, in the present suit, coupled with his wife's complaint, he has set up a separate and independent cause of action, for services rendered by him and for an accounting for the eight months he was with the defendant. The basis of the demurrer is that there is a misjoinder both of parties and of causes of action. Where this occurs, it has been held with us that the demurrer should be sustained and the action dismissed. *Roberts v. Mfg. Co.,* 181 N. C., 204; *Thigpen v. Cotton Mills,* 151 N. C., 97. Clearly, the two causes of action are separate and distinct; and, if the *feme* plaintiff's husband has been improperly joined as a party plaintiff in her suit, the demurrer should be sustained and the action dismissed under authority of the cases just cited."

We think the court below made no error in overruling the demurrers.

For the reasons given, the judgment of the court below is

Affirmed.

BOARD OF DRAINAGE COMMISSIONERS OF LITTLE SWIFT CREEK DRAINAGE DISTRICT v. EAST CAROLINA LUMBER COMPANY.

(Filed 12 January, 1927.)

Drainage Districts—Liens—Assessments—Foreclosure—Deeds and Conveyances—Actions.

Where the lands of an owner within a drainage district formed under the provisions of C. S., ch. 94, subch. 3, are sold for the nonpayment of assessments for the cost of improvements made according to law, such owner is given under the terms of the statute applicable one year within which to pay the amount of the assessment, when the county buys them at the sheriff's sale, with the costs, interest and other charges authorized by the statute, and this applies to his right against any purchaser whether he elects to exercise his statutory right to foreclose the lien or that of obtaining the sheriff's deed to the lands. C. S., 5361, 8010, 8024, 8033, 8037, 8038, 8039.

APPEAL by plaintiff from judgment of *Nunn, J.*, at Chambers, 3 September, 1926. Affirmed.

This action was heard upon an agreed statement of facts which is as follows:

"1. That plaintiff is a drainage corporation created by decree of Superior Court of Beaufort County, in a special proceeding, entitled, 'C. B. Weatherington et al. v. G. A. Whitford et al.,' under chapter 94, subchapter III, of the Consolidated Statutes of North Carolina, and amendments thereto; defendant corporation is a landowner in said district, and is one of the parties to the proceeding in which the decree was rendered creating said district.

"2. That defendant is the owner of eight tracts of land in said district, described in the complaint and that the drainage assessments against the respective tracts aggregate for the year 1924 the sum of $4,923.89, and for the year 1925 the sum of $4,923.89.

"3. That the drainage assessments for the year 1924 became due on the first Monday in September, 1924, to wit: 1 September, 1924; said assessments were not paid, and on the first Monday in December, 1925, to wit, 7 December, 1925, after complying with all preliminary requirements and after all required notices had been properly given, and after due advertisement, said lands were sold by the sheriff as provided by law and purchased by plaintiff for the amount of said drainage assessments then due, and tax certificates for each tract were duly issued by the sheriff on said date, a separate certificate being issued for each tract, giving the description and acreage of tract and amount for which it was sold.

"4. That the drainage assessments for 1925 became due on the first Monday in September, 1925, to wit, 7 September, 1925; said assessments were not paid, and on the first Monday in May, 1926, to wit, 3 May, 1926, after complying with all preliminary requirements and after all required notices had been properly given, and after due advertisement, said lands were sold as provided by law by the sheriff, and purchased by plaintiff for the amount of said drainage assessments and tax certificates were duly issued therefor on said date by the sheriff, a separate certificate being issued for each tract, giving the description and acreage of tract, and the amount for which it was sold.

"5. That the ten days notice, preliminary to bringing this suit, was served on defendant on 24 July, 1926.

"6. That pursuant to said notice, this action was instituted on 16 August, 1926, to foreclose the said tax certificates for the taxes or assessments due for the years 1924 and 1925, under the provisions of C. S., 8037.

"7. That defendant denies plaintiff's right to bring this suit at this time, insisting that a suit of this character cannot be brought to foreclose the tax certificates for the 1924 taxes, until one year from the date of the tax certificate, to wit, December, 1926; nor for the 1925 taxes until after 3 May, 1927.

"8. That as the contentions between the parties involve questions of law only, it was agreed that the controversy should be submitted to Hon. R. A. Nunn, judge, resident in the Fifth Judicial District, and holding the courts of the First Judicial District, for determination; it being agreed that he should hear and determine the same at chambers, at New Bern, N. C., with all the same force and effect as if heard at term in the Superior Court of Beaufort County, where the action is pending."

Upon consideration of the facts set out in the agreed statement, the court was of opinion that this action cannot now be maintained, for that defendant is entitled to one year from the date of the issuance of the certificates of sale for taxes, within which to redeem said lands. It appearing that one year had not elapsed from the date of the issuance of said certificates of sale to the date on which this action was commenced, it was ordered and adjudged that the action be and the same was dismissed.

From this judgment, plaintiff appealed to the Supreme Court.

Ward & Grimes for plaintiff.
Whitehurst & Barden for defendant.

CONNOR, J. This appeal presents the question, whether there was error in holding that plaintiff cannot maintain this action to foreclose certifi-

cates of sale of real estate, issued by the sheriff, upon a sale of the lands described therein, and owned by defendant, for the collection of drainage assessments, for that one year had not elapsed from the date of said certificates to the date of the commencement of the action. The contentions of the parties hereto involve but one question, to wit: Does a cause of action under C. S., 8037 accrue in favor of the holder of a certificate issued by a sheriff upon the sale of land for taxes, at the date of such certificate, or only after a year has elapsed from said date? The decision of this question must necessarily be determined by pertinent statutory provisions.

C. S., 5361 provides that drainage assessments shall constitute a first and paramount lien, second only to State and county taxes, upon lands assessed for the payment of same; and that they shall be collected in the same manner and by the same officers as State and county taxes are collected. It is further provided therein that "the existing tax law in force when the sales are made for delinquent assessments shall have application in redeeming lands so sold, and that in all other aspects, except as to the time of sale of lands, the existing law as to the collection of State and county taxes shall apply to the collection of such drainage assessments."

In section 3 of chapter 88, Public-Local Laws, 1923, amending C. S., 5361, it is specifically provided that "the owner of said lands so sold, or any person having an estate therein, or having a lien thereon, may redeem the same in the manner provided in C. S., 8038 and in C. S., 8039, or any amendment thereof; and if the board of drainage commissioners shall have been the purchaser of said lands, the amount paid in redemption shall include the sum bid therefor plus the penalty."

The statute relative to the sale of lands for the collection of State and county taxes, C. S., 8010 *et seq.*, provides that it shall be the duty of the sheriff, who has the tax list in hand for collection, to sell the lands of a delinquent taxpayer, and to give to the purchaser a certificate, in writing, under his official seal, in the form prescribed in C. S., 8024. At any time after one year, and within two years, from the day of sale, upon demand of the holder of such certificate, if the land has not been previously redeemed as allowed by law, the sheriff shall execute a deed conveying the land sold and described in the certificate to the purchaser, his heirs or assigns, C. S., 8030. Such deed shall be registered, and shall vest in the grantee, his heirs and assigns the title to the property therein described, C. S., 8033. The holder of the certificate, instead of demanding a deed, to which he is entitled at the expiration of one year from the day of sale, may institute an action in the nature of an action to foreclose a mortgage, and recover thereon a judgment for the sale of the land described in his certificate for the satisfaction of whatever sums may

be due him upon his certificate, or of any other amounts for which he has a lien upon said lands. This action must be commenced within two years from the date of the last certificate of sale held by plaintiff. The plaintiff, whether an individual or a corporation, either public or private, shall be entitled to recover interest at the rate prescribed by statute, on all amounts paid out by him. "Such interest shall be computed from the date of each payment up to the time of redemption or final judgment." C. S., 8037. There is no express provision in the statute fixing the date at which, or after which and within two years, the action to foreclose may be commenced. The right, however, of the landowner to redeem, as allowed by law, is expressly recognized. See *Townsend v. Drainage Comrs.*, 174 N. C., 556.

The right of the owner of land sold for taxes to redeem the same, at any time within one year after the day of sale, by paying to the sheriff for the use of the purchaser, the sum mentioned in the certificate issued to the purchaser by the sheriff, with interest thereon at the rate of twenty per centum per annum, together with all taxes subsequently paid, and all costs and expenditures, is secured by C. S., 8038 and C. S., 8039. This right is specifically extended to the owner of land, sold for the collection of drainage assessments. Chapter 88, Public-Local Laws, 1923, sec. 3. We cannot think that it was the intention of the General Assembly to leave the right of an owner of lands sold for taxes or for assessments, to redeem the same, within one year from the date of sale, dependent upon the choice of remedies by the holder of the certificate of sale. A reasonable construction of the statutes pertinent to the question presented by this record sustains the opinion in accordance with which the judgment herein was rendered.

An action to foreclose a certificate of sale of real estate, authorized by C. S., 8037, cannot be maintained until after the expiration of one year from the date of the certificates; at any time within said year, the owner of the land may redeem the same by complying with the provisions of C. S., 8038. The action must be brought within two years from said date. This leaves only one year within which the action may be brought. The construction of the statutes as contended by plaintiff would deprive the landowner of the right to redeem within one year—a right expressly secured by statute. Whether such limitation upon the right of the purchaser to maintain an action to foreclose the certificates of sale, issued to him by the sheriff, is in accordance with a wise and just policy or not is for the General Assembly to determine. The judgment herein is

Affirmed.

STATE v. W. L. ROSS.

(Filed 12 January, 1927.)

1. Appeal and Error—Criminal Law—Homicide—Corpus Delicti.

Upon conviction of murder in the first degree, the record on appeal must show the *corpus delicti.*

2. Homicide—Murder—Verdict—Capital Felony.

Where a prisoner is tried for murder in the first and second degrees, etc., a general verdict of guilty is insufficient under which to impose the death sentence, it being required that the verdict, under the evidence, specify the greater offense, if they so find the fact to be. C. S., 4200, 4642.

3. Continuance — Criminal Law — Courts — Discretion — Constitutional Law.

While ordinarily the continuance of the case to allow alleged offenders against the criminal law opportunity to prepare their defense, is a matter addressed to the sound discretion of the trial judge, the exercise of this discretion must not violate the provisions of Art. I, sec. 17, of our Constitution, stating that no person shall be deprived of his life or liberty, etc., but by the law of the land.

4. Homicide—Murder—Capital Felony—Preconceived Intent—Evidence in Rebuttal—Drunkenness.

There must be a preconceived intention to commit murder in the first degree, which may be rebutted by evidence that the accused was too drunk to have formed it.

ADAMS and CLARKSON, JJ., dissenting.

APPEAL by defendant from *Cranmer, J.,* at May Term, 1926, of WARREN.

Criminal prosecution tried upon an indictment charging the prisoner with a capital felony, to wit, murder in the first degree.

From an adverse verdict and sentence of death entered thereon, the prisoner appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Cooley & Bone for defendant.

STACY, C. J. This case presents a number of difficult questions.

In the first place, the prisoner is under a sentence of death for the murder of Eula Odum, and there is no evidence or admission on the record that any such crime was ever committed. All evidence of the *corpus delicti* has been omitted from the case, and it does not appear, by agreement or otherwise, that this was proved on the hearing. 7 R. C. L., 774. In justice to the trial court, it should be said that the

only part of the statement of case on appeal, which he settled, is the charge. The balance was agreed upon by the solicitor for the State and counsel for the prisoner.

In the next place, the exception addressed to the refusal of the court to grant the prisoner's motion for a continuance, at least until the second week of the term, in order that he might prepare his defense, presents a question, which, if we were compelled to decide on the present record, would probably find us in disagreement. While, ordinarily, this is a matter resting in the sound discretion of the trial court, nevertheless it should be remembered that the prisoner has a constitutional right of confrontation, which cannot lawfully be taken from him, and this includes the right of a fair opportunity to present his case. *S. v. Hartsfield,* 188 N. C., 357.

Again, in the record, as first certified to this Court, it is stated that the jury returned the following verdict: "That the said W. L. Ross is guilty of the felony and murder in manner and form as charged in the bill of indictment." It was said in *S. v. Truesdale,* 125 N. C., 696, that, since the act of 1893, now C. S., 4200 and 4642, dividing murder into two degrees, first and second, a verdict which fails specifically to find the prisoner guilty of murder in the first degree, will not support a death sentence. See, also, *S. v. Murphy,* 157 N. C., 614. Thinking that an error had probably crept into the record in making up the transcript on appeal, we directed a *certiorari* to the clerk, requiring another certificate of the record as it appears in the Superior Court of Warren County. In response, the clerk has certified a complete transcript of the minutes of the trial. The only record of the verdict appears in the judgment, reciting that the jury "for their verdict have said that the said W. L. Ross is guilty of the felony and murder in the first degree as charged in the said bill of indictment," and the judgment is recorded as the minute of the day's proceeding. Whether this is a sufficient compliance with the requirements of the law (C. S., 952, subsec. 8) we need not now determine, as a new trial must be awarded on other grounds.

These matters are mentioned, however, in passing, and attention is directed to them, in order that they may be guarded against in the future. It is fundamental with us and expressly vouchsafed in the bill of rights that no person shall be "deprived of his life, liberty or property but by the law of the land." Const., Art. I, sec. 17.

The prisoner, if permitted, would have testified that, on the day of the homicide, as well as the day preceding, he had been drinking "quite a bit," and that when he was under the influence of ardent spirits, "he lost his memory entirely." Sallie Bet Ross, the prisoner's adopted daughter and a witness for the State, would have testified on cross-examination, had she been permitted to do so, that the prisoner had

attempted to commit suicide on one occasion and that he would "talk foolish" when under the influence of liquor, which he was in the habit of imbiding quite often.

This evidence was competent on the question of alleged felonious intent. *S. v. English,* 164 N. C., 498; *S. v. Allen,* 186 N. C., 302.

Speaking to the question in *S. v. Murphy,* 157 N. C., 614, *Hoke, J.,* correctly states the law applicable to the present case: "It is very generally understood that voluntary drunkenness is no legal excuse for crime, and the position has been held controlling in many causes in this State and on indictments for homicide, as in *S. v. Wilson,* 104 N. C., 868; *S. v. Potts,* 100 N. C., 457. The principle, however, is not allowed to prevail where, in addition to the overt act, it is required that a definite specific intent be established as an essential feature of the crime. In Clark's Criminal Law, p. 72, this limitation on the more general principle is thus succinctly stated: 'Where a specific intent is essential to constitute crime, the fact of intoxication may negative its existence.' Accordingly, since the statute dividing the crime of murder into two degrees and in cases where it becomes necessary, in order to convict an offender of murder in the first degree, to establish that the 'killing was deliberate and premeditated,' these terms contain, as an essential element of the crime of murder, 'a purpose to kill previously formed after weighing the matter' (*S. v. Banks,* 143 N. C., 658; *S. v. Dowden,* 118 N. C., 1148), a mental process, embodying a specific, definite intent, and if it is shown that an offender, charged with such crime, is so drunk that he is utterly unable to form or entertain this essential purpose he should not be convicted of the higher offense. It is said in some of the cases, and the statement has our unqualified approval, that the doctrine in question should be applied with great caution. It does not exist in reference to murder in the second degree nor as to manslaughter. Wharton on Homicide (3 ed.), 810. It has been excluded in well considered decisions where the facts show that the purpose to kill was deliberately formed when sober, though it was executed when drunk, a position presented in *S. v. Kale,* 124 N. C., 816, and approved and recognized in *Arzman v. Indiana,* 123 Ind., 346, and it does not avail from the fact that an offender is, at the time, under the influence of intoxicants, unless, as heretofore stated, his mind is so affected that he is unable to form or entertain the specified purpose referred to."

For error, as indicated, in excluding the testimony, above mentioned, there must be a new trial, and it is so ordered.

New trial.

ADAMS and CLARKSON, JJ., dissent.

FRED COX, BY HIS NEXT FRIEND, M. G. STAMEY, v. WHITMER-PARSONS PULP AND LUMBER COMPANY, AND PECO SNEED.

(Filed 12 January, 1927.)

1. Removal of Causes—Federal Courts—Fraudulent Joinder—Separable Controversy—Complaint—Diverse Citizenship.

Upon the question of whether an action against a nonresident and a resident defendant is severable, and whether the resident defendant was fraudulently joined to oust the statutory jurisdiction of the Federal Court, the matters relating thereto as alleged in the complaint are controlling upon the motion of the nonresident defendant to remove the cause to the Federal Court for diversity of citizenship.

2. Same—Issues—Jurisdiction.

If the petition of the nonresident defendant sufficiently alleges that a resident defendant was joined by the plaintiff merely to defeat the jurisdiction of the Federal Court, which is sufficiently controverted by the plaintiff, an issue of fact is raised for the determination of the Federal Court.

3. Same—Questions of Law.

Where a nonresident defendant seeks to remove a cause from the State to the Federal Court for fraudulent joinder of a resident defendant, he must set forth the facts constituting the fraud upon which he relies, and not its mere conclusion of law.

4. Same—Master and Servant—Safe Place to Work—Nondelegable Duty of Master.

Where the complaint alleges facts tending only to show that the tort upon which he rests his action for damages arose from the nondelegable duty of a nonresident master, and that there was no independent act of negligence attributable to the plaintiff's superior who was joined as a resident defendant, upon the nonresident defendant's proper and sufficient petition and bond for the removal of the cause from the State to the Federal Court for diversity of citizenship, no sufficient ground for a fraudulent joinder to oust the jurisdiction of the Federal Court appears, and the cause will accordingly be ordered removed by the State court.

STACY, C. J., and ADAMS, J., dissenting.

APPEAL by plaintiff from order of *Harding, J.*, at Chambers, dated 6 August, 1926. From HAYWOOD. Affirmed.

Action to recover damages for personal injuries, commenced in the Superior Court of Haywood County. In apt time, defendant, Whitmer-Parsons Pulp & Lumber Company, filed its petition for the removal of the action from the Superior Court of Haywood County to the United States District Court for the Western District of North Carolina. From order directing the removal of the action in accordance with the prayer of the petition, plaintiff appealed to the Supreme Court.

Morgan & Ward for plaintiff.
Thomas S. Rollins for defendant.

CONNOR, J. Plaintiff is a citizen of North Carolina, residing in Haywood County; defendant, Whitmer-Parsons Pulp & Lumber Company, is a corporation, organized under the laws of the State of Delaware, and is a citizen of said state; defendant, Peco Sneed, is a citizen of North Carolina. The amount involved in this action, which was commenced in the Superior Court of Haywood County, is $25,000, which sum plaintiff seeks to recover of defendants as damages for personal injuries alleged to have been caused by the joint negligence of defendants.

At the time of his injury, plaintiff was an employee of defendant, Whitmer-Parsons Pulp & Lumber Company; he alleges that defendant Peco Sneed was the superintendent and foreman of said company, in charge of the construction of the trestle from which plaintiff fell. He further alleges that he was ordered and directed by the said Peco Sneed as superintendent and foreman of his codefendant, to assist in laying steel rails across a high trestle. While at work, pursuant to such orders and directions, he fell and was injured. He alleges that his injuries were caused by the negligence of defendants, and each of them, in that—

"(a) The defendants and each of them negligently and carelessly provided a dangerous and hazardous and unsafe place for the plaintiff to do the work then and there required of him, and failed and neglected to provide and furnish the plaintiff with a reasonably suitable and safe place to perform the work then and there required of him;

"(b) The plaintiff, being then a minor of tender years, without any experience whatever, was ordered and directed to go out on a high trestle, which had been negligently floored, and on which one of the ties on which the plaintiff was required to stand and work did not extend all the way across the said trestle, thereby leaving a hole which the plaintiff was permitted and allowed to fall through without warning the plaintiff of the dangers incident thereto, and without using proper care in furnishing the plaintiff with a reasonably safe place to do and perform his work;

"(c) Defendants furnished the plaintiff with a crowbar which was broken off, and which was too short to do and perform the work then and there required of him, and which by reason of being too short and broken off caused the plaintiff to fall through said hole which was negligently and carelessly left in said trestle;

"(d) Defendants carelessly and negligently caused the plaintiff to fall through said hole in said trestle, which had been left by the negligence of the defendants in placing thereon a short tie, thereby causing the plaintiff's head to be bursted, mashed, lacerated, bruised and permanently

injured, and other parts of his body to be bruised and mashed, all to his great damage, as hereinafter stated."

In its petition for the removal of the action from the Superior Court of this State to the United States District Court for the Western District of North Carolina for trial (Jud. Code, secs. 28 and 29; U. S. Comp. Stat., secs. 1010 and 1011), defendant, Whitmer-Parsons Pulp & Lumber Company, alleges:

"That plaintiff has wrongfully and fraudulently joined as a codefendant with your petitioner one Peco Sneed, who is an immaterial, unnecessary and improper party to this controversy, and that the controversy is one solely between the plaintiff and the petitioner for whom plaintiff was working as an employee, at the time he was injured.

"That the plaintiff was a common laborer and member of a section crew engaged in lining steel rails on a trestle at the time of his injury, and the said Peco Sneed was the section foreman; that plaintiff was using a crowbar which was in good condition, and was doing the work in his own way at the time he stepped and fell from the trestle; that all of the crossties on the trestle were the usual and ordinary length and were 10 feet and longer, and that the shortest crossties, which were 10 feet in length, extended 21 inches on the outside of the rail on each side of the track; that some of the crossties were longer than 10 feet and extended something like 3 or 3½ feet on the outside of the rails.

"That the plaintiff was standing on the end of one of the 10-foot crossties, on the outside of the rail, and while using a crowbar in lining the rail, negligently, thoughtlessly and carelessly stepped back without looking and fell from the end of the crosstie to the ground, a distance of 20 to 22 feet, without any fault or negligence on the part of defendants or of either of them.

"That said Peco Sneed was not immediately present at the time plaintiff stepped and fell, and the plaintiff was doing ordinary common labor, along with other section employees, in lining up the track; that the work plaintiff was engaged in was the work of your petitioner, and not the work of the said Peco Sneed; that it was no part of the duty of said Peco Sneed to furnish the plaintiff with a reasonably safe place to work, reasonably safe tools and appliances, give the plaintiff warnings and instructions in constructing the trestle, but that it was a duty owed to the plaintiff by the petitioner, as the employer, and was not the duty of said Peco Sneed.

"And your petitioner avers that the plaintiff has wrongfully and fraudulently made these joint allegations of negligence against your petitioner and the said Peco Sneed and has wrongfully and fraudulently joined the said Peco Sneed with your petitioner for the fraudulent purpose of preventing a removal of this cause to the Federal Court,

which has rightful jurisdiction over this controversy and which can be fully tried out between them without the presence of said Peco Sneed; that the plaintiff knew that said allegations against Peco Sneed were untrue and with full knowledge on his part, he made the same, not in good faith, but for the wrongful and fraudulent purpose of preventing a removal."

For the purpose of determining whether the cause of action upon which plaintiff seeks to recover of defendants is separable, and therefore removable from the State court to the Federal Court, upon the petition of the nonresident defendant, the facts as alleged in the complaint are determinative. *Timber Co. v. Ins. Co.,* 190 N. C., 801. In *Smith v. Quarries Co.,* 164 N. C., 338, this Court has said: "It is the approved position with us that actions of this character may be prosecuted as for a joint wrong, and authoritative decisions hold that when so stated in the complaint and made in good faith, the allegations viewed as a legal proposition must be considered and passed upon as the complaint presents them, and in such case no several controversy is presented which requires or permits a removal to the Federal Courts." In *Hollifield v. Telephone Co.,* 172 N. C., 714, it is said: "The plaintiff is entitled to have his cause of action considered as stated in the complaint. If there has been a joint tort committed, he may sue the wrongdoers jointly or separately, at his election, as they are liable to him in either form of action." These principles are approved in *Swain v. Cooperage Co.,* 189 N. C., 528. In his complaint filed in this action, plaintiff seeks to recover of defendants as joint *tort-feasors;* the cause of action is founded upon the joint wrong of defendants, and if the facts as stated in the complaint are alleged in good faith, the controversy is not separable, and, although between citizens of different states, is not removable on that ground.

The right of removal by a nonresident defendant with whom plaintiff has joined a resident defendant, cannot be defeated, if such joinder is fraudulent, in that the resident defendant has no real connection with the controversy but was joined as a defendant with the purpose of preventing a removal from the State to the Federal Court. "If in such a case, a resident defendant is joined, the joinder although fair upon its face, may be shown to be only a sham or fraudulent device to prevent a removal; but the showing must be made by a statement in the petition for removal of facts rightly leading to the conclusion apart from the pleader's deductions." *Swain v. Cooperage Co., supra,* and cases cited. If the facts alleged in the petition, taken to be true, show that the resident defendant has no real connection with the controversy, the petition for removal must be granted by the State court; if they are controverted by the plaintiff, the issues must be determined in the Federal Court, which will remand or retain the action for trial, upon its findings of facts involved in the issues raised. *Johnson v. Lumber Co.,* 189 N. C., 81, and cases cited.

In the instant case, both plaintiff and the resident defendant were employees of the nonresident defendant; the negligence alleged as the cause of plaintiff's injuries was the breach of nondelegable duties owed by the nonresident defendant to plaintiff, by reason of their relationship as employer and employee; plaintiff and the resident defendant were coemployees of the nonresident defendant; the fact that the resident defendant was the foreman in charge of the work, upon which plaintiff was engaged at the time of his injury, does not *ex vi termini* impose upon him the duties by the breach of which plaintiff alleges he was injured; petitioner alleges in its petition that said foreman owed no duty to plaintiff, with respect to the place at which he was at work or the tools and appliances furnished plaintiff by his employer with which to do his work, or with respect to warnings and instructions as to the danger necessarily involved in his work; that petitioner alone owed these duties to plaintiff. Said foreman, as appears from the petition, was not present when plaintiff was injured, and had given no specific orders or directions as to the place at which plaintiff was working when he was injured, or as to the tools with which he was working. If the facts are as alleged in the petition for removal, Peco Sneed has no real connection with the controversy between plaintiff and his employer, the petitioner; he is, as alleged in the petition, an immaterial, unnecessary, and improper party to the action. The facts alleged in the petition rightly lead to the conclusion that he was joined as a defendant, not in good faith, but for the purpose of preventing a removal of the action from the Superior Court of Haywood County to the United States District Court.

We find no error in the order of removal. It is

Affirmed.

STACY, C. J., and ADAMS, J., dissent.

JOHN R. WENTZ v. PIEDMONT LAND COMPANY, J. C. HURLEY, P. C. WHITLOCK, TRUSTEE, ALFRED W. BROWN, AND JOHN M. WILSON AND J. M. PORTER, PARTNERS, TRADING UNDER THE FIRM NAME OF WILSON & PORTER.

(Filed 12 January, 1927.)

1. Injunction—Restraining Order—Continuance to Hearing.

Where the plaintiff in injunction makes it to appear that his remedy at law is inadequate and that he may probably succeed in establishing that he would otherwise sustain irreparable loss, and the rights of all parties preserved, the restraining order theretofore issued will be continued to the hearing of the case.

2. Appeal and Error—Injunction—Evidence—Review.

Upon appeal the Supreme Court may review the evidence upon which the Superior Court judge has acted on the hearing before him, and continued the restraining order.

APPEAL by defendants from *Schenck, J.,* Superior Court of MECKLENBURG County, continuing to the hearing a temporary injunction, heard at Chambers, Gastonia, N. C., on 27 August, 1926. Affirmed.

The order is as follows: "This cause by agreement of counsel coming on to be heard before me this day on the order of his Honor, R. A. Nunn, judge, to show cause why the injunction sued for be not continued to the hearing (the same having been continued from time to time by consent of counsel), and being heard upon the pleadings, exhibits and affidavits filed therein, after hearing of argument by counsel, and the court being of the opinion and finding as a fact from the pleadings, exhibits and affidavits that there is probable cause that the plaintiff will be able to make out his case on final hearing, and it appearing from the pleadings that serious questions of facts are raised to be passed on by a jury at the final hearing: Now, therefore, it is ordered and adjudged that the injunction heretofore granted be, and the same is continued in full force and effect to the hearing, that is to say, the defendant, P. C. Whitlock, trustee, is forbidden and restrained from consummating or taking any further action to consummate the foreclosure or sale under deed of trust of the tract of land described in paragraph four of the complaint herein, and also the contract attached to the complaint and marked 'Exhibit A'; that the defendants J. C. Hurley and A. W. Brown, and each of them are forbidden and restrained from selling, assigning, transferring or disposing of in any manner whatsoever, that certain promissory note dated 1 May, 1924, executed by W. C. Rankin, Howard L. Hopkins and T. Roach Garrison, payable to George Stephens on the ..... day of ..... after date in the sum of seventy-five hundred dollars ($7,500.00), and endorsed by said George Stephens and now held by defendant, J. C. Hurley, or the defendant, Alfred W. Brown, as agent or trustee, for said J. C. Hurley, or both of them, and secured by a deed of trust described in paragraph two of the complaint, recorded in the office of the register of deeds for Mecklenburg County, in Book 570, page 220. This order shall become effective upon the plaintiff filing with the clerk of the Superior Court of Mecklenburg County a good and sufficient bond in the sum of five thousand dollars ($5,000.00), conditioned upon his saving the defendants harmless from any loss or damage occasioned by the granting of this order if it shall hereafter be determined that the same was improvidently granted." The undertaking of John R. Wentz was duly given, in accordance with the order of Schenck, J.

The defendants' only assignment of error is "that the court erred in signing the order continuing the restraining order to the hearing."

J. Laurence Jones and J. L. DeLaney for plaintiff.

Whitlock, Dockery & Shaw for defendants J. C. Hurley and P. C. Whitlock, trustee.

Carswell & Ervin for defendant Piedmont Land Co.

CLARKSON, J. The rights of the parties to the controversy are complicated. Certain principles of law are applicable when the facts are ascertained. On the record, as to material facts, there is serious conflict. In injunction proceedings this Court has the power to find and review the findings of fact on appeal, but the burden is on the appellant to assign and show error, and there is a presumption that the judgment and proceedings in the court below are correct.

Plaintiff has given bond, in accordance with the order continuing the injunction to the hearing, "conditioned upon his saving the defendants harmless from any loss or damage," etc.

From a careful study of the entire record, we can find no reversible error in the order of the court below.

In *Seip v. Wright,* 173 N. C., at p. 15, it is held: "Where it will not harm the defendant to continue the injunction, and may cause great injury to the plaintiff, if it is dissolved, the court generally will restrain the party until the hearing. *McCorkle v. Brem,* 76 N. C., 407; where serious questions were raised. *Harrington v. Rawls,* 131 N. C., 40; or where reasonably necessary to protect plaintiff's rights, *Heilig v. Stokes,* 63 N. C., 612. . . . If the plaintiff has shown probable cause or it can reasonably be seen that he will be able to make out his case at the final hearing, the injunction will be continued is another way of stating the rule," and cases cited. *Cab Co. v. Creasman,* 185 N. C., p. 556; *Johnson v. Jones,* 186 N. C., p. 235; *Plott v. Comrs.,* 187 N. C., p. 125; *Brinkley v. Norman,* 190 N. C., p. 851.

In *Hurwitz v. Sand Co.,* 189 N. C., p. 6, it is said: "A court of equity looks always towards doing justice to the parties and in good conscience protecting their rights until the final adjudication of the controversy through the courts. . . . The courts of equity are gradually adjusting themselves to modern conditions and look to what in good conscience is for the best interest of the litigants, without resorting to any hard or fast rule."

For the reasons given, the order of the court below is

Affirmed.

BESSIE S. SPRINGER v. S. J. SPRINGER.

(Filed 12 January, 1927.)

1. Husband and Wife—Alimony—Statutes—Marriage.

In the wife's application to the courts for alimony without divorce, C. S., 1667, it is not required that the judge find the facts upon which he bases his order allowing it.

2. Appeal and Error—Case—Dismissal—Record Proper—Affirmance of Judgment.

Where the record on appeal contains no case settled, the appeal may be dismissed, or the Court may affirm the judgment of the lower court if no error appears upon examination of the record proper.

APPEAL by defendant from *Lane, J.*, at May Term, 1926, of BURKE. Affirmed.

Self & Bagley and Wright & Stevens for plaintiff.
L. C. Grant and John D. Bellamy for defendant.

ADAMS, J. The plaintiff brought suit for alimony without divorce. C. S., 1667. Pleadings were filed and Judge Lyon made an order that the defendant pay the plaintiff $250 on or before 20 August, 1925, and $75 a month until 1 January, 1926, and retained the cause for further orders. Thereafter Judge Lane made an order permitting the defendant to file an amended answer within thirty days, but he required the defendant to pay to the clerk of the Superior Court of Burke County a certain sum as an allowance for the plaintiff's attorneys. A provision allowing the defendant to raise this amount by a mortgage on his property was inserted in the order, the plaintiff says, at his request. Judge Lane's order is dated 7 June, 1926, and the notice of appeal was given on 18 June, 1926. In this notice there is a request that the judge then find the facts, but no such request was made at the hearing; there is also a request that the judge direct that the pleadings, the findings of fact which were not made, the appeal bonds, and the notice constitute the case on appeal.

We find nothing in the record showing that the case was ever submitted to the judge for settlement or for a compliance with the requests contained in the notice. There is no case on appeal and no error in the record proper. The judge was not required to find the facts under C. S., 1667. *Price v. Price,* 188 N. C., 640.

As the facts appear we could properly dismiss the appeal, but as no error appears in the record we affirm the judgment. *Smith v. Mfg. Co.,* 151 N. C., 260.

Affirmed.

CARLYLE ET AL. V. STATE HIGHWAY COMMISSION.

(Filed 12 January, 1927.)

1. Roads and Highways—State Highway Commission—Statutes—Discretionary Powers—Reservation of Powers—Location of Highways—County Seats.

The large discretion given by the Legislature to the State Highway Commission was limited by the express words of the statute to exclude the relocation of public highways connecting the various counties of the State, disconnecting them or making any change, alteration or discontinuance when such would exclude county seats existing along the highways, or the principal towns located along the route.

2. Same—Mandatory Statutes—Discretion.

The requirement of the statute that the public system of highways under the control of the State Highway Commission must "run to" and "connect" with county seats, is mandatory, withdrawing from its large discretionary powers that of relocating one of these roads contrary to this statutory provision.

3. Same—Exercise of Discretionary Powers—Final—Statutes.

Where the State Highway Commission has complied with the formalities prescribed by the statute with regard to a highway leading into and from a county seat, and has accordingly designated the existing roads as appeared upon the map, as a part of the plan adopted, and according to the terms of the statute has posted the map it has made at the courthouse door in the proper county, and has thereafter continued to so use the roads designated and by its conduct and acts has thus maintained them, its act in so doing is a final determination of the fact that the roads so adopted are the most practical routes within the meaning of the statute, and the exercise thereafter of any discretion in making radical or substantial changes in the location is ineffectual.

4. Same—Maps.

When the Highway Commission has mapped, adopted, selected, established and maintained an existing highway as the sole, separate and independent line connecting two county seats, this is a location of the road by the commission, and no radical or substantial departure therefrom can be made.

5. Statutes—Amendments—Interpretation—State Highway Commission.

The amendment of the Legislature of 1921 to the laws of 1919, the latter of which referred to county seats and principal towns, etc., by the use of the words "most practicable route," applies to the connection of the State's highways with the National highways in adjoining states, and not to connecting the county seats, etc., in the manner required by the former act.

6. Roads and Highways—State Highway Commission.

A contract by a county to loan money to the State Highway Commission upon the agreement that the latter should establish and maintain a highway in its State system of roads, is ineffectual, *Johnson v. Highway Commission*, 192 N. C., 561, cited and applied.

CARLYLE *v.* HIGHWAY COMMISSION.

7. Same—Adoption of Highway Into System.

Where by its final determination the State Highway Commission has adopted a highway as a part of the State's system of roads connecting two county seats of the State, it may not as a discretionary measure, change this route thirteen miles from one of them and consolidate it with another highway which enters the county seat in question, upon the ground that it would be a saving of expense to the State.

CLARKSON, J., concurring; STACY, C. J., and ADAMS, J., dissenting.

CIVIL ACTION before *Midyette, J.,* at Chambers, 7 September, 1926, from ROBESON.

This was an action for an injunction to restrain the defendant from the alleged termination of route No. 70 at Pates.

Affidavits were filed by all parties. J. L. Prevatt and some one hundred and fifty others were permitted, without objection, to intervene in the cause. The interveners filed a brief, but they asked the same relief as the plaintiff.

The trial judge found the facts, and, upon such findings, entered judgment in favor of the plaintiffs. The judgment and findings of fact are lengthy, but by reason of public importance of the case, they are set out in full as follows:

This cause coming on to be heard before his Honor, G. E. Midyette, judge presiding, at chambers at Lumberton, N. C., on 7 September, 1926, it being the return day of the temporary restraining order heretofore issued herein, and upon motion to continue said restraining order to the final hearing, and all parties being before the court and represented by counsel, and the court having considered the pleadings, affidavits and exhibits and having by consent made a personal inspection and view of the several highways involved in this controversy.

The court now from the pleadings, affidavits, exhibits and admissions of the parties finds the following facts:

1. The court allows an amendment to the complaint so as to allege that the individual plaintiffs are taxpayers of the county of Robeson and State of North Carolina as well as citizens of said county and State. Most of said individuals live along the route now designated by defendant as highway No. 70, being the route marked in red upon the map which is hereto attached, marked Exhibit "A" and made a part hereof. Some of said individuals live in Lumberton but own property near and affected by said highway.

2. Certain other citizens and taxpayers of Robeson County were allowed by the court to intervene and become parties to this action. These individuals live several miles north of present highway No. 70 and near or along the road which is contended by them to be the true

ROCKFISH CREEK
McMILLIAN
ROSLIN
McNATTS
GRAHAMS
LUMBER RIDGE
PARKTON
TIM. BR.
70'X14 BRIDGE
McMILLIAN
OAKLAND
CROSS ROAD
BLANCHARD
S.B.&B. CO. R.R.
TARDYS
SHANNON
CONOLYS. SIDING
PEARSALLS
REX
L.R.CO.R.R.
GILMORES SIDING
GRADE CROSSING
RED SPRINGS
DUNDEE
TOGLEMORY
RENNERT
ST PAUL
SMITHS
MARSH SYRUP
ROZIER
ROAD
WAKULLA
COVINGTON
ALFORDS
FLORAL COLLEGE
GRADE CROSSING
CROMARTIE
WOODMORE
SOUTHERLAND
MAXTON
BUIES
PATTERSON
ALMA
SANDY
SELLERS
RED BANKS
GRADE CROSSING
POWERS
HOWELLSVILLE
PEMBROKE
McLEODS
MOSS NECK
BEE GEE
LUMBERTON
RAEMON
ELROD
TOLARS
ALLENTON
BRUCE
PURVIS
CHURCH
SCHOOL
RAYNHAM
CHALMER
BRACEY
McCORMICKS SIDING
ALFORDS SPRING
ROWLAND
McDONALDS
POPE
RINGSDALE
BELLAMY
COTTINGHAM
YORKVILLE
FORD
HAMER
FAIRMONT
PROCTORVILLE
ORRUM
BOARDMAN
DELIA
BARNESVILLE
FLOWERS
MARIETTA
HOLMES V.
PARKVILLE
LUMBER RIVER
SOUTH CAROLINA
R.R. CO.
GRADE XING
TO THE BEACH
LEGEND
U UNIMPROVED
D DIRT OR GRAVEL
T TOPSOIL
SC SAND CLAY
G GRAVEL
M MACADAM
ST SURFACE TREATED MACADAM
P PENETRATION MACADAM
B BRICK
C CONCRETE
A ASPHALTIC
FOR FEDERAL AID ROADS AFFIX "(FA)" AFTER SYMBOL, AS A(FA) T(FA) ETC.
ROADS SURVEYED BY R.H. ROCKWOOD ENGINEER
DATE OF SURVEY: FROM MARCH 31 TO APRIL 17, 1921
ROBESON COUNTY, N.C.

location of the road as fixed by the legislative map, this being the road marked upon the map, Exhibit "A," as the route contended for by the interveners.

3. There are three several routes involved in this controversy, all of which are shown upon the map, Exhibit "A" hereto, to wit, the route marked in yellow which is contended for by the defendant; the route marked in red which is contended for by the plaintiffs, and the route contended for by the interveners which is marked as such.

4. Chapter 2, Public Laws of 1921, and the map thereto attached, provides for a State highway connecting the town of Raeford, county seat of Hoke County, with Lumberton, county seat of Robeson County, and this highway is indicated as running through the town of Red Springs, in the county of Robeson. The defendant has heretofore constructed a State highway along a part of said route, to wit, that part between Raeford and Red Springs, and is now proposing to construct the balance between Red Springs and Lumberton, and the construction of this part of said highway has produced the present controversy.

5. Upon the organization of the defendant and ever since then, it has construed the route marked in red upon the map, Exhibit "A," hereto as the route laid down upon the legislative map of 1921, and ever since that time the defendant has kept up and maintained said highway along the red line, same being an integral part of State highway No. 70, and has always been marked and designated as such upon all maps issued by the defendant.

6. That prior to the institution of this action, the defendant proposed to abandon several miles of the route shown in red, being a part of the present State highway No. 70, and in lieu thereof to construct a highway from Philadelphus Church to a point near Pembroke, where it will connect the present hard surface highway No. 20, being the yellow route upon the map hereto attached, and were arranging to let the contract for the construction thereof, and would have let said contract had they not been stopped by the injunction issued herein.

7. That prior to the institution of this action, a contract was entered into between the board of commissioners of Robeson County and the defendant, State Highway Commission, a copy whereof is hereto attached, marked Exhibit "B," and made a part hereof.

8. Under this contract a hard surface road has already been built and completed from the South Carolina State line by way of Rowland to Lumberton, which highway intersects with highway No. 20, about three miles west of Lumberton; and the contract has been let for grading and surfacing a highway from Fairmont to Lumberton and work is now being done thereon and it is the purpose of the defendant to hard-surface said road in due course.

9. Acting under said contract, defendant proposes to abandon several miles of present State highway No. 70 (the red route) and to construct a highway from Philadelphus in a southerly direction to a point near the Indian school at Pembroke, this being the route shown in yellow upon the map hereto attached. At Pembroke said yellow route would connect with State highway No. 20, and persons coming to Lumberton would follow route No. 20 from Pembroke on into Lumberton, a distance of thirteen miles.

10. If the proposed road is constructed from Philadelphus to Pembroke along the yellow line as proposed by the defendant, it will lengthen the distance between Red Springs and Philadelphus and Lumberton by approximately three miles, but on account of the fact that highway No. 20 is already paved, the yellow route would be cheaper to construct than the red route, the difference in cost of construction being approximately $225,000.00.

11. If the proposed highway was constructed along the red route, the present line of route 70, it will intersect with highway No. 20 at a point about three miles west of Lumberton, and from that point into Lumberton routes 70 and 20 are identical, this part of the route being a natural stem from the location of the ground and the fact that the road for this distance runs near Lumber River and the swamp thereof, and for a distance of three miles of Lumberton present route No. 20 also serves route No. 70, and for that distance the two highways are the same; but when a point is reached about three miles west of Lumberton, the direct route to Red Springs and Raeford lies in one direction, whereas route No. 20 lies in a different direction, as is indicated upon the map hereto attached.

12. If the proposed highway is constructed along the yellow route as proposed by the defendant, State highway No. 70, instead of intersecting with highway No. 20 at a point three miles west of Lumberton and coming thence into Lumberton by a natural stem, will intersect State highway No. 20 at a point near Pembroke, which is thirteen miles from Lumberton, and all persons traveling between Lumberton and Raeford, Lumberton and Red Springs, or Lumberton and Philadelphus will have to travel via Pembroke and thus lengthen the distance to be traveled by approximately three miles.

13. According to the legislative intent, as contained in chapter 2, Public Laws of 1921, present route No. 70, the red route was intended to unite the town of Raeford, county seat of Hoke County, with Lumberton, county seat of Robeson County, and as shown by the map attached to said act, said road was to be constructed via the town of Red Springs. Defendant has already constructed a highway along that part of said route between Raeford and Red Springs, and is now preparing

to construct the balance of the highway from Red Springs to Lumberton, but now proposes to abandon several miles of said highway, present route No. 70, between Red Springs and Lumberton, and to construct a new highway along the yellow route shown upon said map.

14. If said highway is constructed along the yellow route as proposed by the defendant it will disconnect the towns of Raeford and Lumberton by thirteen miles, in that, instead of following the direct route as indicated on the legislative map of 1921, the proposed yellow route deflects sharply to the south from Philadelphus Church to Pembroke and there connects with highway No. 20, at a point thirteen miles from Lumberton.

15. That to allow the highway between Red Springs and Lumberton to be constructed along the yellow route would be to deprive the town of Lumberton of the service of a highway connecting it with Raeford as indicated upon the legislative map attached to chapter 2, Public Laws of 1921.

16. That to allow several miles of present route No. 70 to be abandoned and the highway to be deflected and diverted to a point several miles distant, as proposed by the yellow route, would deprive the citizens living along present route No. 70 or having property thereon of the rights and benefits conferred upon them under chapter 2, Public Laws of 1921.

17. That to allow the abandonment of several miles of the present route 70, the red route, and the construction of the yellow route, would be to deprive the town of Lumberton of the service of said highway, and would cause certain travel from Red Springs and Philadelphus and that section to be diverted from Lumberton to Pembroke, Maxton, Laurinburg and other points along highway No. 20.

Upon consideration of the foregoing facts the court is of opinion that the defendant is without power under chapter 2, Public Laws of 1921, and amendments thereto, to disconnect the county seats of Hoke and Robeson counties, as would be done by the construction of the route shown in yellow on the map from Philadelphus to Pembroke, and by abandoning several miles of the present highway No. 70, the red route, and the defendant is also without power to reduce the number of highways leading into the town of Lumberton from county seats of adjoining counties, and while the court does not undertake to control the location of State highways between county seats, principal towns and other termini named in the act of 1921, the court does have the power to prevent a disconnection of county seats and any abandonment of any such part of the route when such abandonment would work a disconnection of county seats.

It is, therefore, on motion of attorneys for plaintiffs, considered and adjudged that the defendant be, and it is hereby restrained and enjoined from letting a contract for the construction of the proposed highway along the yellow line, or from taking steps toward the construction thereof between Philadelphus and Lumberton via Pembroke, or from Philadelphus along the yellow line to a point in the vicinity of Pembroke, and this order shall apply to all persons acting under, by or for the said defendant, to wit, its agents, servants, employees and attorneys until the final hearing of this cause. And this cause is retained for further orders.

Referring to the fifth finding of fact, it was admitted by the defendant that, some time during the year 1921, it posted a map at the courthouse door in Robeson County, showing the routes the State Highway Commission proposed to take over, and that the route marked in red upon the map, Exhibit "A," was the route by which a connection was established between Lumberton and Red Springs, and that, thereafter, the defendant marked this route as a portion of Highway No. 70, and has since that time maintained it, and these facts constitute the basis for his Honor's finding.

The defendant admits that the location from Philadelphus Church to Pembroke contemplated by it is not in accordance with the legislative map. This Philadelphus-Pembroke location is evidenced by the yellow line on Exhibit "A."

That the words "natural stem," referred to in paragraphs eleven and twelve, do not indicate any route laid out by nature itself, but only refers to a flow of traffic over the route referred to as "a stem," and this flow of traffic uses this route because there is no other way yet constructed for it to use, and so far as the contour of the vicinity of Lumberton is involved it is approachable from any angle or direction with a highway.

Varser, Lawrence, Proctor & McIntyre and McLean & Stacy for plaintiff.

T. A. McNeill, Frank McNeill, F. D. Hackett, Jr., and Lee & Lee for interveners.

Attorney-General Brummitt and Assistant Attorneys-General Ross and Nash for defendant.

BROGDEN, J. The Road Act, for the purposes therein specified, provided for a State system of highways:

(a) "Running to all county seats and principal towns." (Sec. 2.)

(b) "Connecting the various county seats, principal towns and cities." (Sec. 3.)

(c) "Forbidding any change, alteration or discontinuance of any road so as to disconnect county seats, principal towns, etc." (Proviso, sec. 7.)

So that the law requires that all roads in the system, designated by the act, shall run to and connect the county seats. And in order that the county-seat-to-county-seat nature of the system shall be preserved, safeguarded and guaranteed, it was further provided that county seats should not be disconnected.

The record in this case presents two aspects of the same question, to wit:

Does a highway "run to" a county seat when it terminates at a point thirteen miles from its corporate limits? Does a highway "connect" a county seat when it lacks thirteen miles of touching it at all?

To ask these questions, nothing else appearing, is to answer them in the negative.

Therefore, the inevitable conclusion is, that if the road, as proposed by the defendant, does not "run to" and "connect" the county seats involved in the controversy, there has been no compliance with the express terms of the law. And, if the road, as proposed by the defendant, disconnects a county seat, then, this also, would violate the express terms of the statute.

Now the county seats involved are Raeford, in Hoke County, and Lumberton, in Robeson County. Between these two county seats is Red Springs, which is admittedly a principal town, or, at least, there is no controversy about that. The Road Act required that these two county seats and this principal town should be connected by a highway. In obedience to the command of the law, the defendant undertook to establish a connection between these two county seats by way of Red Springs, the principal town. There was a road already in existence and in use prior to the ratification of the Road Act and prior to the creation of the Highway Commission. This road ran to Lumberton from Raeford and Red Springs. The defendant, in compliance with section 7 of the Road Act, in the exercise of its discretion, proposed five roads to constitute "the roads in such county in the State system." In the exercise of its discretion, it went further. It designated or made these roads certain by making a map thereof and posting it at the courthouse door in Robeson County. The roads so mapped and designated by the defendant were as follows:

(a) From Elizabethtown, the county seat of Bladen, to Lumberton, entering Lumberton from the east.

(b) From Columbus County, entering Lumberton from the southeast.

(c) From Fayetteville, the county seat of Cumberland, to Lumberton, entering Lumberton from the north.

(d) From Laurinburg, the county seat of Scotland County, entering Lumberton from the west.

(e) From Raeford, in Hoke County, to Lumberton, entering Lumberton from the northwest.

Each of said roads was designated and mapped as a separate, distinct and independent road. No objection was made by the road-governing body "of either Hoke or Robeson County," or by the "street-governing body" of either Raeford, Red Springs or Lumberton. The law says: "In that case the said roads or streets, to which no objections are made, *shall be and constitute links or parts of the State Highway System.*" If objection had been made by the designated parties, the defendant, after giving notice, would have heard the whole matter. In such event, the law says: "And the decision of the State Highway Commission shall be final." But the matter did not stop here. The defendant, in the exercise of its discretion, not only proposed and mapped this road as a part of the State Highway System, but it accepted it, as it existed, by taking it over and assuming control of it, and by maintaining it for more than five years. It gave it a name and called it Route No. 70. Under these circumstances, Route No. 70 was established by the defendant as a separate, distinct and independent road, constituting the sole and only connection between the county seats of Raeford and Lumberton. By identically the same process No. 20 was established as a separate, distinct and independent road, constituting the sole and only connection between the county seats of Laurinburg and Lumberton. No. 20 has been paved without material "change, alteration or discontinuance" so far as this record discloses.

Hence, the trial judge finds, as follows: "Referring to the fifth finding of fact, it was admitted by the defendant that some time during the year 1921 it posted a map at the courthouse door in Robeson County, showing the routes the State Highway Commission proposed to take over, and that the route marked in red, upon the map Exhibit 'A,' was the route by which a connection was established between Lumberton and Red Springs, and that, thereafter the defendant marked this route as a portion of highway No. 70, and has since that time maintained it, and these facts constitute the basis for his Honor's findings. It (the defendant) has construed the route marked red upon the map Exhibit 'A' (hereto attached) as the route laid down upon the legislative map of 1921."

This finding by the trial judge settles four propositions:

(1) That route, marked in red Exhibit "A," contended for by the plaintiff, was a road actually in existence and use, and not a random line upon a map dipping in swamps or scaling mountains.

(2) The defendant, in the exercise of its sound discretion, proposed this road as a part or link of the State System.

(3) The defendant, in the further exercise of its sound discretion, mapped this road and posted the map at the courthouse door in Robeson County, thus giving notice to the world "of the roads that are to be selected and made a part of the State System of Highways."

(4) The defendant, in the exercise of its sound discretion, selected this road as the identical road, shown on the legislative map attached to and being a part of the Act of 1921.

Therefore, this road was proposed, designated, mapped, selected and established, by the defendant, in the exercise of its sound discretion, as the connecting link of the State Highway System between Raeford, Red Springs and Lumberton.

But, at this point the ways part asunder.

The defendant says in its answer "that subject to the limitations above referred to, the duty, obligation and authority is imposed upon the said defendant to change or relocate any existing roads to the end that the "most practicable routes will be finally established and constructed."

This proposition means that the essential requirement of the law is that the highway shall be built by the "most practicable routes." Who is to determine these practicable routes, the Legislature or the defendant? The defendant says it has the sole power to decide this question. Suppose the defendant should determine that none of the existing roads, designated in accordance with the formalities required by the statute, were "practicable routes," then, by such reasoning, it could construct and establish an entirely and totally new system of highways for the State. Therefore, it would inevitably follow that with the right to construe the law and thereupon create a new system of roads in accordance with such construction, the legislative and judicial functions of the State, with respect to roads, would disappear.

The Road Act of 1921 was an amendment to chapter 189 of the Public Laws of 1919. The Act of 1919 provided, "for the construction and maintenance of a system of State highways which shall be constructed so as to form a system of modern highways . . . connecting by the 'most practicable routes,' the various county seats and other principal towns of every county in the State." Thus, it will appear that in the Act of 1919, the words: "most practicable routes" referred directly to county seats and principal towns. But the Act of 1921 used the words "most practicable routes" in a totally different connection, as will appear by reference to section 2 of the act. There, the words "most practicable routes" occur in a clause as follows: "And linking up with State highways of adjoining states and with national high-

ways into national forest reserves by the most practicable routes." It is true the caption of the act uses the words "practicable routes" in connection with county seats and principal towns, but the caption of an act "cannot be used to extend or to restrain any positive provisions in the body of the act." *S. v. Patterson,* 134 N. C., 612; *Hadden v. Collector,* 72 U. S., 107. But, however, this may be, the Legislature declared that this road was a "practicable route" when it placed it on a map which was incorporated as a part of the statute. The defendant declared that it was a "practicable route" when it mapped this identical road and posted it at the courthouse door in Robeson County and notified the governing authorities of the county and of the town that this route was "to be selected and made a part of the State System of Highways." It is not to be assumed that the able and expert engineers of the defendant would have deliberately mapped and posted an existing road, and selected and accepted it, which they knew or had reason to believe was an "impracticable route." Upon the other hand, it is to be assumed that the defendant designated, mapped, selected, and assumed control and maintenance of it in good faith, and in the exercise of its sound judgment and discretion, as a "practicable route" between Raeford and Lumberton. It cannot be contended that the law required the defendant to assume control of this road within sixty days. Section 8 of the statute provides that the State Highway Commission within sixty days from the ratification of the act "shall commence to assume control of the various links of road constituting the State Highway System and shall complete the assumption of control . . . as rapidly as practicable." Hence the statute, very wisely, set no time limit as to the assumption of control, leaving this matter to the sound judgment and discretion of the Commission, in order that it might have full opportunity to investigate, among other questions, whether the route was "practicable" or not, or whether, if selected, the cost of paving would be reasonable, or whether the engineering features were favorable.

There is another phase of the statute which is the subject of conflicting contentions. It is contended that the words of the statute "shall be and constitute links or parts of the State Highway System," and the words "the decision of the State Highway Commission shall be final" should not be construed according to their strict and mandatory import, because road building is a technical problem and in the natural course of events, a trained body of experts and expert engineers would find many changes and alterations desirable and which would promote the efficiency of the system. The legal effect of this contention is that the word "tentative" should be read into the law. Thus, the legislative map should be deemed in all respects "tentative." The county map made and posted by the defendant should be construed in all respects "tentative." The

words "shall be and constitute links or parts of the State Highway System" should be read: "shall be and constitute tentative links or parts of the State Highway System." Also, that the words: "decision of the State Highway Commission shall be final" should be read: "decision of the State Highway Commission shall be tentative." Whether or not the word "tentative" should be read into the statute is a question open to debate. But as to whether the courts or the Legislature should put the word there is not open to debate. The function of the court is to construe laws and not to make them. If the courts attempt to read into the law words of their own or read out of the law other words contrary to their conception of what the law ought to be, then this would amount to erecting a legislative despotism of five men, which would perhaps be more pernicious and subversive of the State's peace than the judicial despotism mentioned by *Chief Justice Pearson* in *Brodnax v. Groom,* 64 N. C., p. 244.

In *School Comrs. v. Alderman,* 158 N. C., 191, *Justice Hoke* declares the following rule for construing statutes: "In other words, the statute must be interpreted literally. Even though the Court should be convinced that some other meaning was intended by the law-making power, and even though the literal interpretation should defeat the very purposes of the enactment, still the explicit declaration of the Legislature is the law, and the courts must not depart from it."

So, in our case, there are explicit declarations by the Legislature, and under the rule announced by *Justice Hoke* these explicit declarations are the law, irrespective of what the Court thinks as to their wisdom or unwisdom.

Of course changes, alterations and discontinuances of proposed roads shown on the legislative map were authorized under certain limitations, but when that map was actually fitted to the ground by the defendant through the map made by it and posted at the courthouse door, and by the exercise of its discretion in accepting, selecting and incorporating such road into the State system the explicit legislative declaration was "and the decision of the State Highway Commission shall be final."

Justice Ruffin, in *Pugh v. Grant,* 86 N. C., 47, in discussing the interpretation of statutes, says: "The true rule for construing a statute, and we may say the only honest rule, for a court really seeking to observe the will of the Legislature, is to consider and give effect to the natural import of the words used. If they be explicit, and express a clear, definite meaning, then that meaning is the one which should be adopted, and no effort should be made by going outside of the words used, to limit or enlarge its operation. Above all, it is not to be presumed that the Legislature intended any part of a statute to be inoperative and mere surplusage."

Did the Legislature intend that the map attached to the statute and incorporated as a part thereof should be "inoperative and mere surplusage"?

Did it intend that the words "shall be and constitute links or parts of the State Highway System" should "be inoperative and mere surplusage."

Did it intend that the "designation of all roads comprising the State Highway System as proposed by the State Highway Commission shall be mapped" was to "be inoperative and mere surplusage"?

The word "designation," according to its "natural import," has an established meaning. The definition given in Webster's International Dictionary is: "A pointing out or showing; indication. Selection or appointment for a purpose. That which designates; a distinguishing mark or name." This definition has been adopted and applied in *Kimball v. Salisbury,* 56 Pac., p. 975, and in *S. v. City of Red Lodge,* 83 Pac., 643.

Thus, the "designation of all roads," etc., and the subsequent acceptance and selection thereof was the method by which the statute required the defendant in the exercise of its discretion to point out, make known, designate and mark out the roads in each county which were to be "selected and made a part of the State System of Highways."

Now, if the word "tentative" can be read into the various clauses of the act, and the words "most practicable routes" can be construed to mean such routes as the defendant may from time to time determine, then the statute can be reduced to a simple minimum, to wit, that the State issued $50,000,000 in bonds and in due course turned over said funds to the defendant to establish and construct such a system of highways for the county seats and principal towns and by such connections as the Highway Commission may, in its discretion, deem wise and proper. The Court has nothing to do with the question as to whether the delegation of such discretion would be wise or unwise. With us, the only question is, did the Legislature, by the language employed, actually delegate such discretion? We think not.

We are, therefore, of the opinion that the statute means that when an existing highway has been designated, mapped, selected, established and accepted by the State Highway Commission as the sole and independent connection between two county seats in compliance with the formalities prescribed by the statute that this is a location of the road as a permanent link of the State System of Highways.

Now Raeford, Red Springs and Lumberton, having been "connected," both by the formalities prescribed by law and by the exercise of the discretion of the defendant in accepting and adopting this highway marked in red upon Exhibit "A," as the sole, separate and independent

link between the two county seats, we are of the opinion that any radical or substantial departure therefrom would constitute a disconnection.

Thus, in *Newton v. Highway Commission,* 192 N. C., p. 54, the Court held: "We conclude that the Road Act itself connected the county seats according to the best judgment of the Legislature. A substantial departure from such connection so made by the sovereign power of the State must, of necessity, constitute a disconnection."

The defendant, however, earnestly insists that the law ought not to be so declared for three reasons:

(1) That the road proposed by it "runs to" and "connects" Lumberton because it enters No. 20 at Pates, near Pembroke, and while this point is thirteen miles from Lumberton, still No. 20 runs from Laurinburg to Lumberton and is now a paved highway, and the public could travel from Raeford to Red Springs and from Red Springs to No. 20 at Pates, and thence enter Lumberton from the same direction and at the same point. We assume that there can be no serious contention but that No. 70, the route in controversy, by virtue of the proposed change, would terminate at Pates in No. 20. Now, if No. 70 can be terminated in No. 20, thirteen miles from the county seat, and yet "run to" and "connect" it, why could not the same result be achieved by terminating No. 70 fifteen miles distant, and, if fifteen miles, why not forty? A traveler from Raeford would still enter Lumberton from the same direction and at the same point. In the exercise of the same discretion, why could not the road be built from Red Springs or Raeford to enter No. 20 at Laurinburg and "run to" and "connect" Lumberton through Laurinburg. Even in this event, a traveler from Raeford or Red Springs would still enter Lumberton from the same direction and at the same point, and thus under the guise of changes, alterations and discontinuances, the entire system of highways could be consolidated into a few great thoroughfares. Evidently, the Legislature contemplated that Lumberton was entitled to these roads as independent entities. If the proposed termination of No. 70 at Pates should be allowed, this would reduce the number of roads designated by the statute, and also by the defendant. There would be a conflict between the judgment of the Legislature and the judgment of the defendant. We are of the opinion that the judgment of the Legislature should abide.

Obviously, a road can only connect points between its origin and its terminus. So far as this controversy is concerned the origin of the road is Raeford and the terminus, under the proposed change, would be Pates, near Pembroke, thirteen miles from the objective. Hence, Lumberton would not be on the route of the road at all. The law required that the highways in the State system should "run to" and "connect" the county seats at all events, and irrespective of any maps, proviso or discretion.

(2) The second reason urged in behalf of the defendant is that this Court has heretofore established the law to the contrary. This proposition requires an examination of the cases relating to the subject. There are three decisions bearing upon the construction of the Road Act, but only one of these decisions, to wit, the *Newton case,* undertook to deal with the question of connecting county seats, and the question involved in this appeal is the question of connecting county seats.

The first case decided by the Court was *Road Commission v. Highway Commission,* 185 N. C., p. 56. In that case the Highway Commission, on 2 May, 1921, mapped a road as required by the statute running from Tarboro to Halifax, two county seats, by way of Speed and Hobgood. The county authorities within sixty days signified their approval. Thereupon, on 1 September, 1921, a short time after the sixty days had expired, "the Highway Commission, having had a hearing to determine whether finally to approve the route between Scotland Neck and Tarboro, passing through Hobgood and Speed, abandoned the location of that part of the route between Moore's Crossing and Scotland Neck, substituting a shorter, and, as it adjudged, a better route." The Court held: "It was evidently the intent of the statute that the posting at the courthouse door was to give the State Highway Commission an opportunity to pass upon objections which might be raised against the proposed location by the local authorities and the restriction of 60 days in which such objection could be made was a restriction upon the local authorities only. It was not intended to take from the State Highway Commission the general discretionary authority conferred in section 7 to 'change, alter, add to, or discontinue' the roads shown on the map posted by the Highway Commission.

The action of the Highway Commission complained of consisted merely in shortening the road between Moore's Crossing and Scotland Neck (2 points on the road between Halifax and Tarboro). It does not appear that this was an abuse of the authority vested in the Highway Commission, and the court below properly refused to grant a mandamus to compel the Highway Commission to adhere to the first or tentative location of the road. Neither by length of time nor long use, nor by the allegation of any other fact does it appear that the Highway Commission exercised their discretionary power arbitrarily or abusively."

An analysis of this opinion discloses, therefore:

(a) That the action complained of was the mere shortening of a road between two county seats involving neither a connection nor a disconnection of either principal towns or county seats.

(b) That the Highway Commission did not accept the road as mapped or incorporate it into the State System of Highways, but ex-

pressly declined to do so promptly, and after a public hearing in Raleigh on 1 September, 1921. The statute provided that it could hear objections and render a decision, and provided further: "And the decision of the State Highway Commission shall be final."

In the case now before us the action complained of is not the mere shortening of a road between two objectives, fixed by law, but it is the termination of it and the destruction of its identity thirteen miles before it reaches its objective; and, further, in our case, the Highway Commission accepted the road in controversy, incorporated it into the State system, and has maintained it as such for more than five years.

Hence, the case of *Road Commission v. Highway Commission, supra,* is not decisive of the principle of law involved in the present appeal.

The next case, involving a construction of the Road Act, was *Cameron v. Highway Commission,* 188 N. C., p. 84. This case and the *Newton case* are the "apples of discord" in the road law. They both present an honest but fundamental divergence of opinion. The decision in the *Cameron case* was rendered by four *Justices,* the *Chief Justice* having been called to his reward before the case was decided. Three of the four *Justices* wrote opinions. The divergence of opinion and of interpretation of the statute are fully reflected in the decision. For instance, the main opinion says: "We do not controvert the proposition that the defendants are clothed with certain discretionary powers; but, as we interpret the act, these powers do not include changing, altering, or discontinuing all roads in the exercise of a discretion which can be reviewed only in case of oppression or bad faith." The concurring opinion says: "In my opinion, it must be determined by the State Highway Commission in the exercise of a sound discretion, subject to judicial review only in case of abuse of discretion or when the authority reposed in the Commission has been exercised in an arbitrary and unreasonable manner." Another concurring opinion says: "that the Legislature was not only not willing to confer such extended powers on the Commission, but they did not—they limited them in going from county-seat-to-county-seat, to go by principal towns."

These declarations of law, with respect to the discretion delegated by the statute to the defendant, are as far apart as the zenith and the nadir.

Again, the main opinion says: "To hold with the defendants that the right to determine what are principal towns is to be referred to the commission itself, and that their action is final, except in case of manifest abuse, would be the proper interpretation of the act if there had been no proviso."

A concurring opinion, discussing the identical proposition, says: "To my mind, principal towns, mentioned in the statute, and which may not

be disconnected from the State's System of Highways, are to be determined by the State Highway Commission in the exercise of a sound, but not arbitrary judgment."

Another concurring opinion says: "The towns on the map were the principal towns in the mind of the Legislature when the act was passed."

These declarations of law as to how a principal town could be identified and determined are also as far apart as the zenith and the nadir, and yet they are the utterances of three *Justices* out of four who participated in the Cameron decision. The *Cameron case* went off upon the point that Stem was not a principal town, and, therefore, it was not necessary to connect it by the highway running from Oxford to Durham. The record in the *Cameron case* discloses that it was alleged in that case and stressed at great length in the briefs that the road from Oxford to Durham had been mapped, and the map posted at the courthouse door; that no objection had been made by the governing authorities, and that the Highway Commission had thereupon taken the road over and maintained it for about three years. But the effect of posting the map at the courthouse door is not referred to in the opinion of the Court. The effect of the acceptance of the road and of the incorporation of it into the State System of Highways was not discussed or mentioned in the opinion. The effect of explicit legislative declarations "shall be and constitute links or parts of the State Highway System" and the "decision of the State Highway Commission shall be final," are not mentioned or discussed. It would appear that this is sufficient evidence of the fact that the Court left these matters open for future determination, for the reason that it was not necessary to pass upon them if Stem was not a principal town, because, in such event, there was no requirement that Stem should be connected at all with either the highway system or with Oxford and Durham, and if there was no requirement that Stem should be connected at all, there was certainly nothing in the statute to prohibit or prevent a disconnection. An interesting sidelight disclosed by the *Cameron case* is the statement of engineers of defendant, as follows: "It is, therefore, my opinion that the engineering factors favor the Stem route. The margin is not great, and other factors, such as local service, opening up a new section, and land values, which favor the Creedmoor route, should be balanced against the engineering features and the advisability of changing the State Highway from its present location on the Stem route." It was further stated in briefs of plaintiff that an error of approximately $20,000.00 had been made in the calculation of the estimated cost of the two routes with the result that the Creedmoor route, chosen by the defendant, was the more expensive construction. In other words, in the *Cameron case,* the defendant undertook to abandon the road even

though its engineering features were more favorable and the cost of construction less. At all events, however, the road was built to Durham and to Oxford, the county seats. There was no effort made to consolidate the road with some other highway or to terminate it thirteen miles from Durham.

As the writer interprets the *Cameron case,* there were three points upon which a majority of the Court agreed, to wit:

1. Stem was not a principal town in contemplation of the law.

2. The language of the proviso of section 7 was mandatory and not discretionary.

3. That the map attached to the legislative act could not "reasonably be accepted as a legislative fiat to construct a system of highways in strict conformity with the roads proposed."

These propositions are not decisive of the present case now under consideration. As to whether or not Stem was a principal town is immaterial to this appeal. It is agreed on all sides and in all the cases that the language of the proviso is mandatory, and it is not intended in this *Carlyle case* that the highway should be paved in "strict conformity" with the proposal shown on the legislative map but rather that when that map was fitted to the ground by the defendant with all the formalities prescribed by the statute, and thereupon an existing highway is selected, accepted and actually incorporated into the State system, that the period of "proposing" ended and the period of permanent links or parts of the State Highway System began.

The third case dealing with the construction of the statute was *Newton v. Highway Commission,* 192 N. C., p. 54. This case involved the nature of the connection of the highway system with the town of Newton. The connection through the town of Newton had been proposed, mapped, established, taken over, selected and designated as a part of route No. 10 in accordance with the formalities of the statute, and the Court held that the defendant was without power to make radical changes and departures from the connection so established.

(3) The last contention made in behalf of the defendant in objection to construing the statute as indicated herein, is that the statute delegates to the defendant certain discretion in the location of a road which is not reviewable by the Courts. The general rule is stated thus in *Newton v. School Committee,* 158 N. C., 187: "In numerous and repeated decisions the principle has been announced and sustained that courts may not interfere with the discretionary powers conferred on these local administrative boards for the public welfare unless their action is so clearly unreasonable as to amount to an oppression and manifest abuse of discretion." The *Newton case* grew out of the selection of a school site for a graded school in Charlotte. The case

of *Newton v. School Committee* was a companion case to *School Comrs. v. Aldermen,* 158 N. C., 191. The aldermen of Charlotte contended that they had the right to approve the selection of school sites rather than the board of education. The Court held that the power to purchase sites and "do everything that is necessary and proper to open and conduct" the schools was broad enough and ample enough to clothe the school committee with sole and exclusive authority to select sites, and that for that very reason the "board of aldermen of Charlotte are without discretion in the matter." There were no formalities prescribed by the statute as to proposed sites or other formalities prescribing how the proposed sites should become final.

The other case most frequently cited in support of the discretion rule is *Brodnax v. Groom,* 64 N. C., 244. That case involved the question as to what are the necessary expenses of a county. An act of the Legislature had been passed authorizing the commissioners of Rockingham County to levy and collect a special tax "for the purpose of building and repairing bridges in said county." The statute did not undertake to limit the discretion of the commissioners at all or to prescribe any formalities to be observed in the location of bridges, but left the whole proposition wide open. The Road Act of 1921 did not leave the whole proposition wide open, but prescribed the formalities by which the location of the road in controversy was to be determined by the defendant, and expressly declared that when those formalities were complied with in the selection and establishment of an existing highway as a connection between two county seats or principal towns that such selections should be and constitute "links or parts of the State System."

In the case now before us, no engineering difficulties or obstructions are alleged, and no reason given for abandoning the road, except that the defendant, in its discretion, desires to do so, because Robeson County loaned the defendant $1,000,000.00 under an agreement that route No. 22, from Lumberton to Rowland, should be built and a portion of route No. 70, from Lumberton to Fairmont, and that this sum is not sufficient to construct these roads, and also the road in controversy, according to the original plan, and, therefore, in order to come within the amount of the fund provided by Robeson County the defendant proposes to lop off a substantial portion of the road and consolidate it with No. 20. This Court has recently held in the case of *Johnson v. Highway Commission,* 192 N. C., p. 561, commonly known as the *Varina case,* that neither the defendant nor the County Commissioners of Robeson County had the legal right to enter into a contract as to the location of the road. The *Varina case* contains a full discussion of the principle and the propositions of law therein contained, and will not be commented on here.

We, therefore, hold, upon the facts as disclosed by this record:

1. That the defendant is without power to divert No. 70 and terminate it at Pates, thirteen miles from Lumberton, because it has been mapped, established, accepted and incorporated as it exists as a permanent link or part of the State Highway System.

2. That the road, as proposed, does not run to and connect Lumberton as contemplated by the statute, and this requirement was mandatory, and therefore excluded any exercise of discretion in that particular.

3. The Legislature has determined that the five independent roads referred to constitute the contemplated service to the county seats. The defendant, in compliance with the formalities prescribed by law, has accepted and incorporated these roads into the State System, and it has no power to diminish or reduce the service by destroying and consolidating a separate and independent link or connection by which that service is to be delivered to the county seat.

4. We hold further that the termination of the road at Pates, thirteen miles from Lumberton, would constitute a disconnection forbidden by the law.

Therefore, we conclude that the judgment should be

Affirmed.

CLARKSON, J., concurring: I concur in the able and logical opinion of *Mr. Associate Justice Brogden,* it may not be amiss to call attention to a few errors that the *Chief Justice* has fallen into in his dissenting opinion. He seems to indicate that in road building the Legislature by statute cannot control its agency, the Highway Commission, in the building of State highways. That instead of the Legislature, the law-making body, being supreme, the Highway Commission is the master and the Legislature the servant, when the clear language of the legislative instruction and command to the Highway Commission was as follows: "A map showing the proposed roads to constitute the State Highway System is hereto attached to this bill and made a part hereof. The roads so shown can be changed, altered, added to or discontinued by the State Highway Commission: *Provided, no roads shall be changed, altered or discontinued so as to disconnect county seats, principal towns, State or National parks or forest reserves, principal State institutions and highway systems of other states.*" The Legislature, responsible to their constituents, took no chances. They had a map, naming the cities and towns on the map, and the roads are shown on the map going through these objectives, and that map was made a part of the act.

In the main opinion in the present action, *Brogden, J.,* has fully and logically gone into the pertinent decisions of the Court in respect to the location of roads constituting the Highway System. Can it be supposed for one moment that the Legislature would put into the hands of ten men—if they had the wisdom of Solomon—$85,000,000, with no restraint, but unbridled, to spend this money when and where they please in the State? Such a judicial dream comes not from the realities of life, but from the cloister of the confined student dealing in aircastles of kingly power, such as we read about in the story books long ago. The primary purpose of the State Highway Act was to take care of and foster the agricultural, commercial and industrial interests of the State. The Legislature, in the due exercise of its power, provided for ten Highway Commissioners, an administrative body, to carry out its will and mandate, giving this Highway Commission fixed, certain and limited powers. The largest appropriation ever made in the history of the State was made, and this enormous sum to be spent on roads was not left to a commission of ten, no matter how capable, efficient and honest they may be, without limitations. The mandate of the Legislature was the building of a fixed system, mapped by it for the commission. The Legislature, the creator, the commission, the agency. A map was attached to the act. It showed the 100 county seats, and marked on the map were the names of each county seat, without calling it a county seat. Also about 176 other places named on the map and the roads as shown on the map went through the county seats and the other places named, as set forth on the map. The general purpose as set forth in the act, was for the State to lay out, take over, establish and construct and assume control of approximately 5,500 miles of hard-surfaced and other dependable highways running *to all county seats and to all principal towns, State parks and principal State institutions,* etc., *with special views* of development of *agriculture, commercial and natural resources of the State;* and for the further purpose of permitting the State to assume control of the State highways, repair, construct and reconstruct and maintain them at the expense of the State and relieve the counties, cities and towns of the State of this burden. The intent was to *establish and maintain* a State system to be hard-surfaced as rapidly as possible, *of durable hard-surfaced, all-weather roads connecting the various county seats, principal towns and cities.*

Since the Halifax Convention, the whole history of the State was contrary to unlimited or arbitrary power. That convention, on 12 November, 1776, adopted the first Constitution of the State. The preamble is "A Declaration of Rights made by the Representatives of the Freemen of the State of North Carolina." The very first section was "That all political power is vested in and derived from the people only."

It took eight years before the surrender at Yorktown to make good that the divine right of kings to rule was at an end. I believe that this State will never recede from the principle, not only to make the "world" but "North Carolina" safe for democracy. No administrative body appointed by the law-making body with definite and fixed duties, by judicial decision can be given a monopoly of power and destroy any road, mapped, taken over and going through the county seats in the 100 counties of the State and the principal towns.

The dissenting opinion of the *Chief Justice* proceeds upon the theory that the defendant, Highway Commission, should have more power. It does concede that there are limitations in the statute, but omits to point out what these limitations are or to give any effect to them. The defendant admitted that the location of the road from Philadelphus Church to Pates is not in accordance with the legislative map. If so, the legislative map has been neither a hindrance nor an obstruction to the full exercise of the discretion of the defendant. If the defendant did not locate the road in accordance with the legislative map, then it must necessarily follow that it located it in the exercise of its own discretion and it ought not to complain of its own act and of the exercise of its deliberate judgment in selecting and incorporating into the State system, the highway in controversy. How many times did the statute contemplate that the defendant could exercise its discretion? It claims the right to exercise it in the same matter twice. If twice, why not a dozen times? It was to prevent this very uncertainty in regard to the location of highways that the statute provided the formalities which should be observed in locating highways, and it further provided "and the decision of the State Highway Commission shall be final." Citizens of the State had a right to rely upon these mandatory provisions of law, and they did rely upon them. They came upon these highways, bought property, built their stores and filling stations thereon with full faith that the General Assembly of this State knew what it was about in prescribing the formalities to be observed in establishing a fixed system of highways for the State and which would avoid the filling of the State with angry discord over the constant juggling of the roads of the highway system. But the dissenting opinion says "that the road has already been located, *though unwittingly on the part of everybody.*" This language means that the Legislature unwittingly made a map and unwittingly incorporated it as a part of the Road Act; that thereupon the defendant unwittingly made a map of the roads in Robeson County, which it unwittingly proposed "to constitute links" in the State Highway System; that thereafter the defendant unwittingly rendered a final decision in the matter and unwittingly took over, selected and assumed control of the road and has unwittingly maintained it for five years. It

is doubted if the defendant will admit that it has so unwittingly performed its duty since its creation.

Again, it is said, in referring to the legislative map: "A very remarkable map, indeed! I confess that it does not excite my admiration as a work of art, for it was never intended as such. It was prepared hurriedly by men in Raleigh who had no idea they were actually locating roads 'by painting highways on a painted landscape.'" The suggestion is that the Legislature in making the map by declaring that the map "is hereto attached to this bill and made a part hereof," was doing a very ridiculous thing. The act was carefully prepared by a committee of the Good Roads Association of the State. It was carefully prepared by the ablest men in the State then in the Legislature. It is considered over the Nation the most practicable piece of road legislation enacted. The two present dissenters do not agree with the combined judgment of that able body of public representatives. An examination of chapter 2, Public Laws 1921, will disclose a map. The legend upon the map is as follows: *"Prepared in office of State Highway Commission of Raleigh, N. C."* If it is a bad map, defendant made it. If it falls short of being a work of art, the defendant alone is responsible. If it is a "painted highway on a painted landscape," then the defendant painted the landscape, presumably, according to its own notions of art. Evidently, the defendant, in making this map attached to the act, assumed responsibility for it by putting its name thereon and claiming the authorship of it. It ought not to be permitted to disown its own child. At the time it was incorporated into the law, it was deemed sufficient as a basis of securing votes for the issuance of $50,000,000.00 of bonds. But it is further asserted that if the formalities prescribed by the statute in locating roads should be upheld that this would in effect amount to settling the location of highways by "legislative fiat." Does this mean that the Legislature has no power to locate a road, but that its servant, the Highway Commission, can do so? If this reasoning is correct, then the servant becomes greater than the master; the part greater than the whole; and the creature greater than the creator. Is there any reason why the Legislature could not locate a road by legislative decree? Every county in the State and every city in the State has been building highways for years by legislative fiat. The governing authorities of counties and cities have passed resolutions directing where streets and highways should be built and how they should be laid out and with what materials they should be paved. Doubtless, they never dreamed that this was building highways by legislative fiat and forbidden by the law.

Now, if the governing authorities of cities and towns of the State can locate highways by legislative fiat, by what process of reason can it

be maintained that the governing authorities of the entire State, to wit, its Legislature, cannot wield these mighty powers?

It is further contended that the Court is attempting to locate a road. I do not so construe the opinion. The Court holds that it has the right to determine when a highway runs to a county seat, and also to determine whether a county seat has been disconnected. In the *Cameron case,* the Court very readily declared that it could determine what a principal town was, although it was a "mixed question of law and fact." But it is now suggested that the Court cannot determine what a disconnection is when there is no dispute as to the fact. I do not think that the processes of reason have changed since the *Cameron case* was written.

It is further said that, "The State Highway Commission, with the aid of the commissioners of Robeson County and other local authorities, has determined that 'the most practicable route' from Red Springs to Lumberton is by way of Pembroke." The same defendant and the commissioners of Robeson County also determined in 1921 that the practicable route from Red Springs to Lumberton was the highway marked in red upon Exhibit "A." So far as this record discloses the road now is just as it was in 1921. There has been no change in the road. It is, therefore, just as practicable today as it was in 1921.

The dissenting opinion by *Mr. Justice Adams* sets up an imaginary case as to what would happen if the termination of the road at McNeill's Bridge had been presented for review. This would doubtless be an interesting proposition if presented, but it seems that no question was raised about this matter in the trial court, all parties apparently being satisfied. The Court, in its opinion, undertook to pass upon the question presented which was, among other things, whether or not the termination of the road at Pates amounted to a disconnection, and whether or not the express command of the Legislature that all roads in the system should "run to" and "connect" county seats had been complied with. Therefore, all fine-spun theories about McNeill's Bridge is not pertinent to this case.

The opinion says further: "The basic error pervading the opinion consists in assuming jurisdiction of the question which the Legislature has referred to an administrative agency of the State." The bald proposition, then, is that no citizen of the State can assert or maintain any right with respect to highways because it is "basic error" to assume that such jurisdiction resides anywhere except in the discretion of the defendant. Then again, it is said: "I think the fallacy implied in the questions quoted above lies in the assumption that by connecting with route 20 at Pembroke, route 70 would terminate at this place." Now, if route 70 does not terminate at Pates, where it intersects route 20,

what becomes of it? Not another inch of grading or excavation can be done upon it. Not an inch of paving could be laid upon it beyond that point. It becomes a lost road. Does it take to the air at Pates or is it in the contemplation of the mind deemed to continue an intangible ghostlike existence with No. 20? Aside from fine metaphysical distinctions, I think the road as a practical proposition terminates at Pates.

With all deference, I think the dissenting opinions do not undertake to meet, discuss or answer the propositions of law contained in the opinion of the Court, but may be fairly termed "confessions and avoidances" by academic discussion of questions not pertinent and an array of impossible, illogical and impractical conclusions.

The issue is clearly drawn. The dissenting opinions assert that the so-called and imaginary "gyves," "shackles" and "thraldom" imposed by law should be taken from the defendant, but if their prayer for relief is granted in the manner and for the reasons given therein, these same "gyves" and "shackles" and this same "thraldom" will be firmly riveted upon the citizens of this State so that they may ask but not be heard; they may knock but it will not be opened. I know not what course others may pursue, but as for me I will stand with undimmed faith for the privilege of the humblest citizen of this State to assert and maintain his rights with respect to the location of the highways.

STACY, C. J., dissenting: I have an abiding confidence that soon or late the Court will recede from the position first taken in the *Newton case* and repeated and extended in principle here. The two cases are at variance with the public policy of the State as established by a long line of decisions, extending over a period of more than half a century. *Brodnax v. Groom,* 64 N. C., 244, decided in 1870, and followed in probably as many as two hundred cases since. See Shepard's Citations and Allen's Reported and Cited Cases, 1926.

It is no duty of the courts to supervise, or to control, the discretionary powers of administrative bodies, except in cases of oppression or manifest abuse, and they ought not to go out of their way hunting such tasks. *Supervisors v. Comrs.,* 169 N. C., 548. To do so, says *Chief Justice Pearson* in *Brodnax v. Groom, supra,* would be to erect a "despotism of five men, which is opposed to the fundamental principles of our government and the uses of all times past." This expression is referred to in the Court's opinion, but apparently the further observation of the learned *Chief Justice,* made in the same connection, has been overlooked. Continuing, he said: "This Court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the Constitution upon the legislative department of the government or upon the county authorities." The

wisdom of this statement would seem to be abundantly supported by our recent disagreements in cases dealing with the powers of the State Highway Commission.

Speaking to the identical question in *Peters v. Highway Commission,* 184 N. C., 30, the late *Chief Justice Clark* said: "The courts are not empowered to supervise the action of administrative boards because of a difference of opinion as to the action taken or contemplated by the officials charged with the duties of administration." And in *Newton v. School Committee,* 158 N. C., 186, *Hoke, J.*, gave expression to the same position in forceful and emphatic language, as follows: "In some of the opinions, decided intimation is given that in so far as the courts are concerned the action of these administrative boards must stand unless so arbitrary and unreasonable as to indicate malicious or wanton disregard of the rights of persons affected. It is undesirable and utterly impracticable for the courts to act on any other principle."

Prior to the decision in *Newton v. Highway Commission,* 192 N. C., 54, it was never thought that the State Highway Commission, clothed, as it is, with certain administrative and governmental functions, chiefly those enumerated in 3 C. S., 3846(j), has less discretion in the location of roads than a township road commission, a county highway commission, or a board of county commissioners. But such is the law as now declared. I know the majority opinion says that the Legislature has so commanded and we must obey. Quite true, if such be its mandate, but I do not so understand the language employed in the statute, and it is recalled that even in the *Newton case* something was said about "the letter killeth, but the spirit giveth life."

Speaking to the question of authority in *Road Commission v. Highway Commission,* 185 N. C., 56, *Clark, C. J.,* delivering the opinion of the Court, said: "It was evidently the intent of the statute that the posting at the courthouse door was to give the State Highway Commission an opportunity to pass upon objections which might be raised against the proposed location by the local authorities and the restriction of 60 days in which such objection could be made, was a restriction upon the local authorities only. It was not intended to take from the State Highway Commission the general discretionary authority conferred in section 7 to 'change, alter, add to, or discontinue' the roads shown on the map posted by the Highway Commission."

The provisions of the statute applicable are as follows: "Fifty-five hundred (5500) miles shall be the approximate maximum limit of mileage of the State Highway System. The designation of all roads comprising the State Highway System as proposed by the State Highway Commission shall be mapped, and there shall be publicly posted

at the courthouse door in every county in the State a map of all the roads in such county in the State system, and the board of county commissioners or county road-governing body of each county, or street-governing body of each city or town in the State shall be notified of the routes that are to be selected and made a part of the State System of Highways; and if no objection or protest is made by the board of county commissioners of the county, road-governing body of any county, or street-governing body of any city or town in the State within sixty days after the notification before mentioned, then and in that case the said roads or streets, to which no objections are made, shall be and constitute links or parts of the State Highway System. If any objections are made by the board of county commissioners or county road-governing body of any county or street-governing body of the city or town, the whole matter shall be heard and determined by the State Highway Commission in session, under such rules and regulations as may be laid down by the State Highway Commission, notice of the time and place of hearing to be given by the State Highway Commission at the courthouse door in the county, and in some newspaper published in the county, at least ten days prior to the hearing, and the decision of the State Highway Commission shall be final. A map showing the proposed roads to constitute the State Highway System is hereto attached to this article and made a part hereof. The roads so shown can be changed, altered, added to or discontinued by the State Highway Commission: *Provided,* no roads shall be changed, altered or discontinued so as to disconnect county seats, principal towns, State or National parks or forest reserves, principal State institutions and highway systems of other states." 3 C. S., 3846(c).

Construing the above provisions in *Cameron v. Highway Com.,* 188 N. C., 84, *Adams, J.,* delivering the opinion of the Court, said: "We think it will appear, from a careful reading of those sections, that the roads outlined on the map were intended as a tentative and not as a completed or final system of highways. *Road Commissioners v. Highway Commission,* 185 N. C., 56. They were referred to in the act as comprising a system 'proposed' by the commission, and again as roads 'proposed' for the State Highway System. They were not intended to be unalterable. In section 7 the commission was given express power, subject to limitations, to change, alter, add to, and discontinue roads; and, apparently, with a view to removing all doubt as to the scope of this power in relation to the question under consideration, it was vested with the specific right 'to change or relocate any existing roads that it may now own or may acquire.' These definite and significant provisions convince us that the map cannot reasonably be accepted as a legislative fiat to construct a system of highways in strict

conformity with the roads 'proposed,' and that the roads may be changed, altered, relocated and discontinued in the sound discretion of the commission, subject to the limitations prescribed by law."

It will be observed that the finality of the decision of the State Highway Commission, mentioned in the statute, relates only to its decision on objections made by the local authorities within sixty days after a map of the proposed roads has been posted at the courthouse door. This is eminently proper, for such decision relates only to a preliminary or interlocutory question, and no appeal to the courts ought to be allowed or permitted until the final location of the road is to be determined. Then, as provided by 3 C. S., 3846(p), in cases calling for its application, "any party affected thereby shall be entitled to an appeal, and the procedure for such appeal shall be the same as provided in chapter twenty-one for appeals from decisions and determinations of the Corporation Commission." The plaintiffs, however, are not proceeding under this section, nor is it a case for such procedure. They are seeking to enjoin the State Highway Commission from locating the road via Pembroke on the ground that such action is unlawful. This is the sole basis of plaintiff's suit. We are therefore not now concerned with the wisdom or impolicy of the proposed change in the highway, but only with the legality of such change.

An erroneous position once taken and adhered to is difficult to maintain, and when such is the case, as here, elaboration not infrequently results in *reductio ad absurdum*. How is the Highway Commission to proceed in the future? It is admitted that the road in the instant case, running from Philadelphus Church to McNeill's Bridge, heretofore designated as a part of route No. 70, is not the same as that shown on the legislative map of 1921. But it has been taken over as such, and, according to the logic of the Court's opinion, it cannot now be abandoned or discontinued as a part of the State System. Why not? Express statutory authority is given the Highway Commission to "change, alter, add to, or discontinue" any of the proposed roads shown upon the legislative map after they have been taken over as a part of the State System, subject only to the prohibition against disconnecting county seats, principal towns, State or National parks or forest reserves, principal State institutions and highway systems of other states. In the *Cameron case,* the entire road from Oxford to Durham, via Stem, was abandoned or discontinued, after it had been taken over and maintained as a part of the State System for three years, and an entirely different road, running by Creedmoor, was substituted in its place. This was held to be lawful, though Stem appeared on the legislative map, and Creedmoor did not. But it is now said that a much less deviation in Robeson County is unlawful. Is the law different in Robeson from

what it is in the counties of Durham and Granville? Under this interpretation it may be doubted as to whether a single one of the highways, going to make up the State System, has been built in strict compliance with the law's command.

Speaking to the question in *Johnson v. Comrs.,* 192 N. C., 561, *Connor, J.,* said: "No question or issue of fact involved in the decision of the Highway Commission with respect to the location of route 21 is raised by the pleadings requiring that it be submitted to or passed upon by a jury; whether the Highway Commission had the power to change the location of the road, presents a question of law only to be determined by the Court. We are of the opinion that the Highway Commission had such power, and that upon the facts alleged in the complaint its exercise of such power is not subject to judicial review."

In *Newton v. Highway Commission, supra,* it was said: "The Court cannot direct the location of the road," and this case is cited with approval in the Court's opinion. Is the Highway Commission, therefore, to understand that the Court is not directing the location of the present road, but is saying that the commission may not abandon or discontinue any part of the road heretofore taken over? If so, which holding is the Highway Commission to follow in the future, the one which says the Court will not direct the location of the road or the one which says the road heretofore taken over may not now be abandoned or discontinued? Has not the Court in effect done in the second breath what it said it would not do in the first? The location of the road is the point at issue in the present suit, hence the two expressions are difficult to reconcile when it comes to applying the law to variant facts.

I know the reply is, the road has already been located and the Court is not undertaking to locate the road, but only declaring what constitutes a permanent location under the statute. But what is the difference, on the facts of the present record, between directing a location and declaring that a permanent location has already been made, when the location of the road is the very question at issue? The plaintiffs say it should be located at one place, the interveners at another and the defendant at still another. The Court says that the road has already been located, *though unwittingly on the part of everybody,* and that said location may not now be abandoned or discontinued. In the *Newton case,* the Court was careful to point out that it would not direct the location of roads. Then the question still remains: Does the Court intend to locate the present road by judicial decree or not? If it does not so intend to locate the road, the result is "confusion worse confounded." On the other hand, if the road is to run from Philadelphus Church to McNeill's Bridge as originally taken over, it

will do so by judicial decree and not otherwise, for no one charged with the duty of designating the roads which are to constitute the State System, thinks it ought to go that way. So in the end, it would seem, that in the instant case the location of the road in controversy is to be made by the Court, and not by the Highway Commission.

The fundamental error in this case lies in the fact that the Court is undertaking to deal with a matter which properly belongs to another tribunal. The location of the road in question has been determined by the State Highway Commission in the exercise of authority conferred upon it by statute. There is no suggestion of any arbitrary action or abuse of discretion on its part. We are, therefore, concerned solely with the lawfulness of the proposed change, and nothing else. That it is in the interest of economy and produces a more practical and convenient route is the judgment, not only of the Highway Commission, but of the local authorities as well.

In the next place, the Court has erroneously assumed, it seems to me, that if the road from Philadelphus Church to McNeill's Bridge is run via Pembroke (even at an increased distance of 2.9 miles, but at a saving in cost of approximately $225,000.00) Raeford, the county seat of Hoke County, *ipso facto* will be disconnected from Lumberton, the county seat of Robeson County, by a distance of thirteen miles, or the distance from Pembroke to Lumberton. The finding of the trial court, in this respect, is not supported by the evidence, and it is not binding on us if it were. The road is not going to stop at Pembroke simply because that portion of it from Lumberton to Pembroke has already been hard-surfaced. The road from Lumberton to Pembroke will become as much a part of route No. 70, as it is now a part of route No. 20, just as the road from Cary to Raleigh is a part of two routes and serves to connect both Durham, the county seat of Durham, and Sanford, the county seat of Lee, with Raleigh, the county seat of Wake.

Clinton and Burgaw are connected with Wilmington by roads which converge at Castle Hayne. Smithfield and Goldsboro are connected with Wilson by roads which converge at Contentnea. The roads which connect Snow Hill and Kinston with Goldsboro become common some distance east of Goldsboro. And the roads which connect New Bern and Greenville with Kinston intersect at a point several miles north of Kinston. Without these and similar economies, it is reasonable to suppose that the county seats, principal towns and other termini mentioned in the Act of 1921, would never be linked together in one comprehensive system of State highways. It is estimated that more than 20,000 miles would be required to run a direct road from every county seat to every other county seat and principal town in the State.

Why should it be necessary to parallel these two roads, approximately a mile apart for a distance of ten miles at an increased cost of $225,000.00 when a single road will serve all the traffic? One reason assigned is that the proposed change is not in accord with the legislative map. Neither is the road that has been taken over. The map, therefore, is to be used only to prevent a change in location and not for the purpose of determining the correct location, otherwise the interveners might prevail. A very remarkable map, indeed! I confess that it does not excite my admiration as a work of art, for it was never intended as such. It was prepared hurriedly by men in Raleigh, who had no idea they were actually locating roads "by painting highways on a painted landscape," and I cannot think the Legislature intended to adopt it as a work of finality, else the State Highway Commission would never have been given authority to employ engineers who use transit and tape.

Speaking to this position, in his excellent brief, the learned Assistant Attorney-General, Mr. Ross, well says: "These *proposed* roads, as said by *Mr. Justice Adams* in *Cameron v. Highway Commission,* 188 N. C., 187, 'were not intended to be unalterable.' They were to be laid out 'by the most practical routes.' To attempt to view them as the then existing traveled highways—the majority of which had been built without engineering advice at all, and some had only followed the trail of the savage or the buffalo—would, in the very beginning, have shackled the Highway Commission to a dead past."

The case, in its final analysis, presents but a single question. It is this: Has the location of all the highways, going to make up the State System, been settled in advance by legislative fiat, or is this a matter to be determined by the State Highway Commission? Before a road can be built, it must be located at some definite and specific place on the ground. Who is to say where that place shall be? I think the Legislature has wisely committed this question to the decision of the State Highway Commission in the exercise of a sound but not arbitrary judgment. It is undesirable and utterly impracticable to build roads in any other way. It is not to be presumed that the Legislature intended a policy of reckless extravagance rather than one of prudent economy in providing for the construction and maintenance of a State System of hard-surfaced and other dependable roads, connecting by the most practicable routes the various county seats and other principal towns of every county in the State.

The State Highway Commission, with the aid of the commissioners of Robeson County and other local authorities, has determined that "the most practical route" from Red Springs to Lumberton is by way of Pembroke. The wisdom of this decision is neither questioned nor

denied; but it is alleged that another road between these two places has already been taken over and that it has now become a part of the State System and as such cannot be abandoned or discontinued. When did a sovereign state ever commit itself to such a policy before?

There is another provision of the judgment deserving of attention. It is not only held that the entire road, heretofore taken over as route No. 70, has now become a part of the State System, and as such, may not be abandoned or discontinued, either in whole or in part, but the defendant is also restrained from building any road "from Philadelphus along the yellow line to a point in the vicinity of Pembroke." Why this specific injunction? Is the Highway Commission limited in its work to the construction and maintenance of roads shown upon the map, except in those cases where it has inadvertently taken over a road which does not appear thereon? If so, then the law sanctions an "ignorant" departure from the map and condemns an "intelligent" one.

It is specifically provided by 3 C. S., 3846(j) that the State Highway Commission shall have power "to locate and acquire rights of way for any new roads that may be necessary for a State Highway System, with full power to widen, relocate, change or alter the grade or location thereof; to change or relocate any existing roads that the State Highway Commission may now own or may acquire," etc. This language would seem to be too plain for debate or for any diversity of opinion. But for some reason not stated by the majority we construe it differently.

The road which connects Raeford, the county seat of Hoke County, with Lumberton, the county seat of Robeson County, runs by Red Springs, Philadelphus Church, thence east of Pembroke to McNeill's Bridge and on into Lumberton. As a more practical route it is proposed to run this same road by Red Springs, Philadelphus Church, Pembroke, thence to McNeill's Bridge and on into Lumberton. And yet it is seriously contended, and actually held for law, that, if that portion of the road between Philadelphus Church and McNeill's Bridge is deflected so as to run by Pembroke, this will disconnect the two county seats. If the two county seats are thus disconnected by the distance from Lumberton to Pembroke, why not by the distance from Lumberton to McNeill's Bridge, or by the distance from Lumberton to Philadelphus Church, or by the distance from Lumberton to Red Springs? What is there about Pembroke that a road cannot pass without stopping?

Under the statute, as now interpreted, it would seem that the State Highway Commission, instead of trying to serve all the people of the State, as it has been and is now doing, should have started at a given

point, moved as rapidly as it could, but taking care not to assume control of any road, either in whole or in part, which, in its judgment, ought not to become a permanent link in the Highway System, for once having taken it over it could not thereafter be abandoned or discontinued. This would have given one section of the State a first and prior advantage over other sections, to be equalized only as the work progressed, but it appears that, in no other way would it have been possible to comply with the statute as presently interpreted. It certainly has not been complied with up to date, for heretofore it has been thought that it had quite a different meaning. Our own decisions have been otherwise. With due deference to my brethren, I think the interpretation now placed on the statute is, not only strained, but entirely at variance with the intent of the Legislature.

It is conceded that when the meaning of a statute is plain and its provisions susceptible of but one intepretation, its consequences, if objectionable, can only be avoided by a change in the law itself. But where the purpose of the Legislature is not clearly expressed, it is always to be presumed that a statute was intended to have the most reasonable and beneficial operation permissible from the language used. And when a statute is ambiguous in terms, or fairly susceptible of two interpretations, the injustice, hardship, or inconvenience which is likely to follow the one construction, or the other, may be considered, and a construction of which the statute is fairly susceptible may be placed upon it, so as to avoid all such objectionable consequences and advance what must be presumed to be its true object and purpose. 25 R. C. L., 1018. In short, it is well settled that if the language of a statute be obscure or ambiguous and its meaning not clearly designated, the effects and consequences of the one construction or the other may and ought to be resorted to as important aids in determining its true meaning and intent. 2 Lewis' Suth. Statutory Construction (2 ed.), secs. 488-490.

But why pursue the matter at greater length? *Cui bono?* Enough has already been said to demonstrate the necessity of further legislative action in order that the State Highway Commission may proceed, in some workable way, with the construction of the State highways. Without such relief, the Commission must now labor under the tyranny and thraldom of intolerable restrictions, which, in my opinion, were never intended by the Legislature; indeed, which cannot be observed if the highways of the State are to be constructed with any regard whatever for economy and the first principles of civil engineering. Nevertheless, the law is, as it is declared. And while all are compelled to bow to the present attitude of the majority, I do so with a firm conviction that the judgment is erroneous, both in principle and result.

ADAMS, J., dissenting: I dissent from the opinion of the Court, not only because I believe it to be unsound in theory and unwise in policy, but because in my judgment it is based upon fundamental error and upon a misconception of the purpose and spirit of the act by which the State Highway Commission was created. Moreover, excepting the *Newton case,* with which it may not in all respects accord, the opinion, as I read it, combats all previous decisions construing the statute, and cannot be harmonized with them through the medium of doubtful or refined distinctions.

The basic error pervading the opinion consists in assuming jurisdiction of a question which the Legislature has referred to an administrative agency of the State. In the determination of the present controversy this exercise of jurisdiction in effect sanctions three propositions: (1) to deflect route 70 from B to C and back to D is necessarily to disconnect Raeford and Lumberton; (2) when a road is once taken over by the State Highway Commission it becomes permanently fixed, and cannot thereafter be changed, altered, or discontinued; (3) the discretion of the Highway Commission is reduced to a narrow and rigidly limited compass.

With respect to the first of these, the position of a majority of the Court is stated in this way: "Does a highway 'run to' a county seat when it terminates at a point thirteen miles from its corporate limits? Does a highway connect a county seat when it lacks thirteen miles of touching it at all? To ask these questions, nothing else appearing, is to answer them in the negative. Therefore, the inevitable conclusion is, that if the road as proposed by the defendant does not 'run to' and 'connect the county seats involved,' there has been no compliance with the express terms of the law. And if the road, as proposed by the defendants, disconnects a county seat, then this also would violate the express terms of the statute."

The force of this argument may be measured by referring to the record in connection with the map filed in the cause. The road "proposed by the defendant" diverges from the line marked route 70 at Philadelphus (B), extends to Pembroke (C), connects with route 20, and proceeding along this route passes D and goes on to Lumberton. The question of principal towns is not involved.

The trial judge held that to make the proposed change would "disconnect the towns of Raeford and Lumberton by thirteen miles"; but as this conclusion involves a mixed question of law and fact, and as this is a proceeding in equity, the finding is subject to review. However, a majority of the Court approve the finding and decide as a matter of law that the defendant has no legal right to make the proposed change and must maintain route 70 from B to D. It may be argued with force that

in this way the decision in reality locates the road; in any event it refuses to permit a change. Now, what is the result? It is said in the opinion that prior to the ratification of the Road Act there was a road extending from Raeford to Lumberton via Red Springs; that the Highway Commission took it over and called it route 70; that by the same process route 20 was established as a separate, distinct, and independent road, constituting the sole and only connection between the county seats of Laurinburg and Lumberton; and that No. 20 has been paved without material "change, alteration, or discontinuance." I think the fallacy implied in the questions quoted above lies in the assumption that by connecting with route 20 at Pembroke route 70 would terminate at this place. Why should it? If by making the proposed change route 70 would terminate at Pembroke (C), why by the same logical process does it not now terminate at McNeill's Bridge (D)? If No. 70 cannot extend along No. 20 from Pembroke to Lumberton, by what sort of logic can it extend along No. 20 from McNeill's Bridge to Lumberton? If No. 70 terminates at D and does not extend along No. 20, then to change it would not disconnect Raeford and Lumberton. If No. 70 extended from Raeford to Lumberton before the Highway Commission was created, then under the reasoning in the opinion No. 20 running from Laurinburg terminates at McNeill's Bridge, where it connects with No. 70. Yet it is said in the opinion that No. 20 is the sole connection between Laurinburg and Lumberton. If Nos. 70 and 20 can extend along the same roadbed from McNeill's Bridge (D) to Lumberton, why could they not extend along the same roadbed from Pembroke to Lumberton? Does one part of the statute apply to the road between McNeill's Bridge and Lumberton and another part to the road between Pembroke and Lumberton? If deflecting No. 70 as proposed would "disconnect the towns of Raeford and Lumberton by thirteen miles," the distance from Pembroke to Lumberton, why are these towns not already disconnected by three miles, the distance from McNeill's Bridge to Lumberton? For according to the logic of the opinion the deduction is that No. 70 or No. 20 must terminate at McNeill's Bridge; both cannot extend along one roadbed. But which shall it be? Obviously No. 70 because, says the Court, No. 20 connects Lumberton and Laurinburg. These, it seems to me, are some of the inconsistencies which flow from an argument resting upon premises or propositions which cannot be maintained. Apparently they are the product of the Court's departure from the interpretation given the statute in former decisions, manifested first in the *Newton case* and extended here far beyond any previous judicial utterance. The result is that the proposed change, which would increase the distance of the road in question only 2.9 miles

MAP # 1
CARLYLE ET AL VS STATE HIGHWAY COMMISSION
ROBESON COUNTY
LEGEND
WHITE LINE
RED LINE
YELLOW LINE
BROWN LINE
ORANGE LINE
TABLE OF DISTANCES
CONSTRUCTION DISTANCE
RED ROUTE: FROM POINT "A" THE SOUTHERN TOWN LIMITS OF RED SPRINGS TO CONNECTION WITH HARD SURFACE ON ROUTE 20 AT LUMBERTON = 13.894 MILES
YELLOW ROUTE: FROM POINT "A" THE SOUTHERN TOWN LIMITS OF RED SPRINGS TO CONNECTION WITH HARD SURFACE ON ROUTE 20 POINT "C" AT PEMBROKE = 8.325 " = 6.333 "
TRAVEL DISTANCE
YELLOW ROUTE: FROM POINT "A" THE SOUTHERN TOWN LIMITS OF RED SPRINGS VIA POINT "C" PEMBROKE AND ROUTE 20 TO THE COURT HOUSE AT LUMBERTON = 14.459 "
RED ROUTE: FROM POINT "A" THE SOUTHERN TOWN LIMITS OF RED SPRINGS VIA ROUTE 20 TO THE COURT HOUSE AT LUMBERTON = 13.961 "
IN FAVOR RED ROUTE
IN FAVOR OF RED ROUTE VIA RED SPRINGS VIA ROUTE TO POINT "D" THEN ROUTE 20 TO COURT HOUSE AT LUMBERTON = 25.894 MILES.
LOCATION OF DEPARTMENT OF STATE HIGHWAY COMMISSION PROFILE AND TOPOGRAPHICAL MAP SURVEYED BY J.W. YOUNG 9-2-26
RENNERT
CROMARTIE
BUIES
RED SPRINGS
PEMBROKE
MAXTON
LAURINBURG
RAEFORD
LUMBERTON
FAIRMONT
ROWLAND
PHILADELPHUS
ROUTE 23
ROUTE 20
ROUTE 211
ROUTE 74
ROUTE 71
ROUTE 72
ELM ST.
GRADE CROSSING
S.A.L. R.R.
A.C.L. R.R.
SCHOOL
CITY LIMITS
LINE AS SHOWN ON LEGISLATIVE MAP OF 1924
LINE AS SHOWN ON LEGISLATIVE MAP AS CONFIRMED BY MUNICIPAL BOARD
N 42-30 W
N 34-00 W
A
B
C
D
E

at an estimated saving of $225,000, is held for the first time to be beyond the powers conferred by law upon the defendant.

As to the question whether taking over a road locates it, little need be said. If when this is done the "period of proposing ends and the period of permanent links begins," unless section seven is without meaning the period of changing, altering, adding to, and discontinuing roads does not end. By the very terms of the statute the right "to change or relocate any existing roads that it (the defendant) may now own or may acquire" continues. This provision is as unambiguous as it is significant. Can it be said with any degree of plausibility that after the Highway Commission has taken over and assumed control of an existing county road, as in this case, it is forever barred against changing or discontinuing it by an imaginary "fitting of the map to the ground"? If so, a large proportion of the highways in this State have been constructed without authority of law. The building of roads in North Carolina is not a simple task; difficult problems must be solved; complex conditions must be met; unforeseen contingencies arise; prevision is demanded; changes are imperative; and if the decision on this point must be adhered to, the work of the commission will hereafter move on as if fettered with gyves or shackles.

The opinion contains repeated references to the defendant's exercise of discretion, from which it is possible to infer that its exercise of discretion as previously declared by the Court is still recognized as a legal right; but a careful reading will show that the opinion restricts the defendant's discretion to such a narrow compass as to make its exercise for practical purposes well-nigh a nullity. The boundary prescribed for this imputed discretion it is not hard to discover. In construing the statute the Court declares that after a road is once taken over or accepted discretion ceases. This construction overlooks the fact that while in certain respects the defendant's discretion may not transgress prescribed bounds, in other respects it is enlarged by the statute beyond the border of discretionary powers generally conferred by law upon administrative boards. Reference is made to the divergence of opinion as reflected on the question in the *Cameron case*. On this point one of the opinions was in effect a dissent, and of course was not in accord with the opinion of the Court in that case. The other two opinions accord in saying that the State Highway Commission is clothed with limited legal discretion, including the discretion expressly conferred by the statute, subject to the limitation contained in the proviso of section seven; also in saying that after a road is taken over it may be altered, changed, or discontinued. The substantial divergence had reference to another question, namely, whether the definition of a "principal town" involves law as well as fact or whether it is a question of fact determin-

able like many other questions in the sound discretion of the Commission. The excerpt taken from the opinion of *Stacy, J.,* refers solely to this question. The opinion in the case at bar after quoting the clause from the opinion of the Court in the *Cameron case,* comes to a full and permanent stop without any reference to the context, which shows full recognition of the discretion conferred upon the commission subject to the limitation in the proviso which has been set out. I am unable to see why this difference of opinion on the legal question whether the term "principal towns" involves law and fact must occupy the vast expanse between zenith and nadir.

The right to exercise discretion in building highways should not be so limited as to make the Highway Commission an automatic mechanism; but so far as my research discloses, the Court up to this time has never made a decision which limits the discretionary power of any similar administrative and governmental agency as the present decision limits the discretionary power of the defendant. The ultimate effect of these "intolerable restrictions" the future will reveal.

LULA PENNELL v. LESTER BROOKSHIRE ET AL.

(Filed 12 January, 1927.)

1. Evidence—Title—Color—Adverse Possession—Grants.

A grant from the State covering the land concerning which the title is in dispute, is not required to be registered before the commencement of the action when registered before the trial, when introduced by the plaintiff for the sole purpose of showing title out of the State, and he has pleaded and relied on title by adverse possession under "color."

2. Evidence—Objections and Exceptions—Motions to Strike Out—Appeal and Error.

Where the question and answer of the witness testifying upon the trial are not duly objected to at the time, the appellant must move in apt time to have the evidence stricken out, for his exception to be considered on appeal.

3. Appeal and Error—Grounds for Appeal—Trials—Different Theories.

Where the appellant has tried his case in the Superior Court on one theory, he may not successfully insist on appeal that error was committed by the lower court upon an entirely different one.

4. Evidence—Title—"Color"—Adverse Possession.

Where the plaintiff in the action involving title to lands relies upon adverse possession under "color," he may recover upon his evidence thereof

without the introduction of a grant from the State to the *locus in quo* for the purpose of showing that title was out of the State, under the presumption raised by our statute, C. S., 426, 3315, 7579.

5. Appeal and Error—Unresponsive Answers—Evidence—Motions.

Where an answer to a question asked a witness on cross-examination is not responsive to the question asked, objection must be taken by motion to strike out the answer, and an exception to the denial thereof, for it to be considered on appeal.

6. Evidence—Title—Adverse Possession—Grants — Statutes — Presumptions.

Where the plaintiff relies on adverse possession under color, and in the conveyance under which she claims color refers to the land as "the Crouch tract," it is competent for a witness to testify that the *locus in quo* was generally known by that name.

7. Evidence — Title — Color — Adverse Possession — Restricted Possession—Deeds and Conveyances—Boundaries.

By his acts and declarations one claiming under title by adverse possession may show that his claim is within the boundaries given in the deed under which he relies as "color."

8. Instructions—Appeal and Error.

Where several phases of the charge of the judge to the jury come within a principle broadly applicable to the case, as, in this instance, the burden of proof, it is not error for the judge to omit to charge upon this general rule each time, when he has once correctly and clearly charged thereon.

APPEAL by defendants from *Lane, J.*, at May Term, 1926, of CALDWELL. No error.

Action to recover damages for trespass upon lands. From judgment upon verdict, defendants appealed to the Supreme Court.

Squires & Whisnant for plaintiff.
W. C. Newland, Lawrence Wakefield for defendants.

CONNOR, J. This action involves title to land situate in Caldwell County. Neither plaintiff nor defendants claim title under a grant from the State, nor do they claim from a common source. Both rely upon deeds offered in evidence, as color of title, and upon adverse possession thereunder for the time required by statute, to vest title, according to their respective contentions.

The jury found that plaintiff is the owner of the land described in the complaint, and that defendants have wrongfully trespassed thereon by cutting timber growing on said land. The damages which plaintiff is entitled to recover of defendants were assessed at $20.00. Defendants contend that there was error in the admission of evidence, to which they objected in apt time, and instructions to the jury, to which they duly excepted.

Plaintiffs offered in evidence a grant from the State, which was not registered at the time the action was begun, but which appeared to have been duly registered prior to the trial. This grant was offered only for the purpose of showing title out of the State; plaintiff's counsel stated in open court, at the time same was offered, that they could not connect plaintiff's title with said grant, and that they did not claim under it. Plaintiff further offered evidence tending to sustain her contention that the land described in the grant was the same land as that described in the complaint, and that she and those under whom she claimed had been in the adverse possession thereof under color of title at the time the action was begun for the time required to vest title thereto in her.

Defendants objected to the introduction of the grant, for that same was not registered until after the action was begun, and for the further reason that plaintiff does not claim under said grant. The objection cannot be sustained upon either of the grounds stated at the trial as appears in the case on appeal. Defendants rely upon *Morehead v. Hall,* 132 N. C., 122. In that case plaintiff relied solely upon the grant, which was not registered on the date the action was begun, as the source of his title. He conceded that at the time the action was begun he had not acquired title by adverse possession, either with or without color of title. In the instant case plaintiff offered the grant, not as the source of her title, but solely for the purpose of showing title out of the State. Although not registered at the commencement of the action, it was competent at least for that purpose. It has been held that registration of a grant from the State is not necessary to give it validity for the purpose of passing title. *Dew v. Pyke,* 145 N. C., 300; *Janney v. Blackwell,* 138 N. C., 437; C. S., 7579. As to registration of deeds of gift, see C. S., 3315. Although a grant was not registered at the commencement of the action if it is registered subsequent thereto, and prior to the trial, one who claims under the grant may connect himself therewith, and thereby show title in himself. *Herbert v. Development Co.,* 170 N. C., 622. A deed unregistered at the time the action was begun, but registered at the time of the trial, may be offered in evidence to show title in one who claims thereunder at the beginning of the action. *Brown v. Hutchinson,* 155 N. C., 207; *Burnett v. Lyman,* 141 N. C., 501.

The objection could not have been sustained upon the second ground assigned at the trial, to wit, that plaintiff did not claim under the grant. One of the various methods by which a plaintiff in an action to recover land may meet the requirement of the law that he must recover, if at all, on the strength of his own title, is that "he may show title out of the State by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession, under color of title, in himself, and those under whom he claims, for seven

years before the action was brought." *Moore v. Miller,* 179 N. C., 396; *Prevatt v. Harrelson,* 132 N. C., 250; *Mobley v. Griffin,* 104 N. C., 112.

In their brief filed in this Court, defendants urge an additional reason why their objection to the introduction of the grant should have been sustained by the trial judge. It appears upon the face of the grant that it was not registered within two years after it was perfected. C. S., 7579. Defendants contend that there was no statute in force at the time the grant was registered, to wit, 3 December, 1924, extending the time for its registration. This was not assigned in the Superior Court as a ground for the objection. It has been held by this Court that a party to an action who has assigned specific grounds for an objection to evidence offered at the trial in the Superior Court will not be permitted to urge another ground in this Court, where the appeal is heard only upon assignments of error based upon exceptions set out in the case on appeal. *Proffitt v. Ins. Co.,* 176 N. C., 680; *Baggett v. Lanier,* 178 N. C., 129; *Ludwick v. Penny,* 158 N. C., 104. Upon a similar principle it is held that a party is not permitted to try his case in the Superior Court on one theory and then ask the Supreme Court to hear it on another and different theory. *Shipp v. Stage Lines,* 192 N. C., 475.

It may be conceded that the registration of the grant on 3 December, 1924, was not authorized by chapter 20, Public Laws 1924, Extra Session, entitled, "An act to extend the time for the registration of grants," etc., ratified 20 August, 1924. It is expressly provided therein that said act shall not affect pending litigation. This action, begun on 5 May, 1924, was then pending. If the grant was not duly registered when offered in evidence, and there was error in its admission for that reason, it cannot be held that such error was prejudicial. The grant was offered as evidence only that title to the land described therein had passed out of, and was no longer in the State; this, however, was conclusively presumed, under chapter 195, Public Laws 1917, now C. S., 426. Plaintiff who relied upon adverse possession under color of title was not required to show title out of the State. She offered evidence of title in herself at the time the action was begun, and did not show merely a line of deeds, as was the case in *Moore v. Miller,* 179 N. C., 396, where it was held that upon the facts in that case the presumption under C. S., 426, did not avail the plaintiff, who in the absence of evidence that title to the land in controversy had passed out of the State could not recover.

We find no error either in the admission of evidence tending to locate the land in controversy, or in the instructions to the jury. Where the answer to a question on cross-examination is not responsive, or contains matter which is objectionable, an exception thereto cannot be con-

sidered on appeal to this Court, unless a motion to strike out is promptly made and denied. *Young v. Stewart,* 191 N. C., 297; 4 C. J., 703. It was competent for a witness to testify that people generally call the land in controversy "the Crouch tract"; the description of the land in deeds offered by plaintiff contains references to the Jacob Crouch land. *McNeely v. Laxton,* 149 N. C., 327.

We do not deem it necessary to discuss assignments of error based upon exceptions to instructions to the jury. These instructions are well supported by authorities cited in plaintiff's brief. In *Haddock v. Leary,* 148 N. C., 378, it is said that the occupant of land under color of title may restrict his constructive possession by his acts and declarations, showing that he does not make his claim of title by adverse possession coextensive with his color of title. This principle was correctly applied in the instruction to which defendants excepted.

The court having fully and correctly instructed the jury with respect to the burden of proof, omission to repeat the instruction in this regard with each succeeding instruction as to the law upon the varying facts as the jury might find them to be from the evidence, cannot be held to be error. The judgment is affirmed.

No error.

P. N. CRISP, ADMINISTRATOR, v. CHAMPION FIBRE COMPANY ET AL.

(Filed 12 January, 1927.)

1. Removal of Causes—Federal Courts—Jurisdiction—Negligence—Torts—Pleadings—Complaint—Severable Controversy—Parties.

Where the amount is jurisdictional and a proper petition and bond has been filed, upon the nonresident defendants' motion to remove the cause from the State to the Federal Court for diversity of citizenship and fraudulent joinder of resident defendants, the complaint filed in good faith will determine the jurisdiction, alleging a joint tort as the basis of the plaintiff's action, when it therefrom appears that the tort alleged is both joint and severable.

2. Same—Petitioners—Conclusions as to Fraudulent Joinder.

Where the complaint in an action brought in the State court alleges a joint tort though the tort is both joint and severable, as the basis of the action against nonresident and resident defendants, and the nonresident has filed a petition in that court to remove it to the Federal Court for fraudulent joinder, to sustain his petition, it is necessary for the petitioner to set forth with particularity such facts as will sustain the conclusion of law therefrom that the joinder of the resident defendant was fraudulent and for the purpose of defeating the jurisdiction of the Federal Court.

3. Same—Motive.

Where the complaint alleges a joint tort against a nonresident and resident defendant, sufficient to retain the cause in the State court, the fact that these allegations were merely for an ulterior bad motive will not alone defeat the jurisdiction of the State court.

4. Same—Master and Servant—Nondelegable Duty of Master—Joint Tort.

It is the nondelegable duty of the master to furnish his servant a reasonably safe place to work, and where the complaint has sufficiently set up a good cause of action in this respect, and has further alleged a tort that would make the servant individually liable for the plaintiff's injury arising from the neglect of the master combined therewith, a joint tort is alleged that will defeat the nonresident's motion to remove the cause from the State to the Federal Court on the ground of fraudulent joinder of parties.

5. Same—Federal Courts—Motion to Remand.

Where the petition filed in accordance with the Federal statute taken in connection with the allegations of the complaint raise material issues of fact that go to the substance of the motion to remove for alleged fraudulent joinder of parties, and nothing else appears upon the face of the record that would defeat the petitioner's right, the case is removed instanter, without the jurisdiction of the State court to pass thereon, plaintiff's rights if any he has, being to present the facts controverted in the Federal Court upon his motion therein to remand.

APPEAL by plaintiff from *Harding, J.*, at July Term, 1926, of SWAIN.

Motion to remove cause to the District Court of the United States for the Western District of North Carolina for trial. Motion allowed, and plaintiff appeals.

Thurman Leatherwood and Alley & Alley for plaintiff.
Thomas S. Rollins for Champion Fibre Company.

STACY, C. J. Walter Grooms, a resident of Swain County, North Carolina, died intestate following an injury received on 25 May, 1925. Plaintiff duly qualified as administrator of the estate of the deceased, instituted this action and filed his complaint in the Superior Court of Swain County, alleging liability for the wrongful death of his intestate by reason of the joint and concurrent negligence of the Champion Fibre Company, a corporation, citizen and resident of the State of Ohio, doing business at Canton and Smokemont, N. C., and C. S. Badgett, a citizen and resident of Haywood County, N. C., and Rufus Speight and R. A. Jones, citizens and residents of Swain County, N. C. The plaintiff demands in his complaint the sum of $50,000.00 as damages for the alleged wrongful death of his intestate.

It is alleged in the complaint that on and prior to 25 May, 1925, plaintiff's intestate was employed by the Champion Fibre Company

as a "woodpeeler" at its tannic acid plant in Swain County and was under the immediate supervision and orders of C. S. Badgett, superintendent over the wood department of the corporate defendant, and R. A. Jones, who was foreman over said department; that the said defendants jointly and severally failed, in the exercise of ordinary care, to furnish plaintiff's intestate a reasonably safe place to work and a reasonably safe and suitable place to perform the work he was employed to do and reasonably safe tools with which to do the work assigned to him, in that the wood, he was directed to peel, was carelessly and negligently piled in large quantities and in such manner as to render the place of work unsafe, without other implements for handling the wood, and notwithstanding repeated complaints from plaintiff's intestate and other employees, which met with promises of improvement, but only to be delayed until after the injury and death of plaintiff's intestate, in consequence of which all of the said defendants, it is alleged, were guilty of breaches of duty which they owed plaintiff's intestate, etc., and which resulted in his injury and death. There are other allegations of negligence set out in the complaint but not deemed necessary to be enumerated for purposes of the present appeal.

The Champion Fibre Company, in apt time, filed its duly verified petition, accompanied by proper bond, asking that the cause be removed to the District Court of the United States for the Western District of North Carolina for trial, alleging, among other things:

"That the plaintiff has wrongfully and improperly joined with your petitioner, as codefendants, C. S. Badgett, Rufus Speight and R. A. Jones, for the sole and only purpose of preventing the removal of this case from the State court to the Federal Court, and for the sole and only cause of depriving the Federal Court of its rightful jurisdiction over this controversy, which is a controversy wholly between your petitioner and the plaintiff as administrator of Walter Grooms.

"That the defendant, R. A. Jones, has not even been served with summons in this case, and is an immaterial, unnecessary and improper party to this action. That the summons has been served upon the defendants, C. S. Badgett and Rufus Speight, but your petitioner respectfully shows to the Court that said C. S. Badgett was general superintendent of the wood operation of your petitioner at the time of the accident, resulting in the death of the plaintiff's intestate, Walter Grooms, and had no direct connection with him whatever and was not present when the accident occurred and knew nothing about the accident until long after it happened.

"That the said Walter Grooms was not injured or killed on account of the negligence of the defendants or any of them, and that none of the defendants were guilty of any of the negligence alleged against

them in the plaintiff's complaint, and that said allegations of negligence alleged against the defendants are untrue and are denied and such statements of negligence were alleged in the complaint against the defendants with full knowledge of their falsity and for the sole and only purpose of preventing their removal of this cause to the United States Court for trial."

It is not seriously contended that the motion to remove should be allowed on the ground of a separable controversy. The requisite separability for removal does not exist where the defendants are jointly liable, either in tort or in contract. *Timber Co. v. Ins. Co.,* 190 N. C., 801, and cases there cited. And where this is the basis of the motion for removal, the plaintiff is entitled to have his cause of action considered as stated in the complaint. *Swain v. Cooperage Co.,* 189 N. C., 528; *Hollifield v. Tel. Co.,* 172 N. C., 714; *Smith v. Quarries Co.,* 164 N. C., 338; *Lloyd v. R. R.,* 162 N. C., 485.

In other words, when the motion to remove is made on the ground of an alleged separable controversy, the question is to be determined by the manner in which the plaintiff has elected to state his cause of action, and, for this purpose, the allegations of the complaint are controlling. *R. R. v. Dowell,* 229 U. S., 102; *Hough v. R. R.,* 144 N. C., 701, and *Tobacco Co. v. Tobacco Co., ibid.,* 352.

"For the purposes of determining the removability of a cause (on the ground of an alleged separable controversy) the case must be deemed to be such as the plaintiff has made it in good faith in his pleadings." *Southern Ry. Co. v. Miller,* 217 U. S., 209.

Speaking to the question in *L. & N. R. R. Co. v. Ide,* 114 U. S., 52, *Mr. Chief Justice Waite,* delivering the opinion of the Court, said: "A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. *Smith v. Rines,* 2 Sumner, 348. A separate defense may defeat his own recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way."

"The complaint is the basis for determining the question of separability"—*Varser, J.,* in *Timber Co. v. Ins. Co., supra.*

Recognizing the rule as it obtains in regard to the removability of a cause on the ground of an alleged separable controversy and appreciating the force of plaintiff's allegations of a joint wrong, the petitioner, in the instant case, insists upon its application for a removal on the ground of an alleged fraudulent joinder of the resident defendants. Upon the filing of such petition, in apt time, when the fraudulent joinder is sufficiently alleged, the suit or action must be removed to the Federal Court, and if the plaintiff desires to traverse the jurisdic-

tional facts, he must do so in that tribunal on motion to remand. *Smith v. Quarries Co.,* 164 N. C., 338.

Where the right of removal arises because of certain facts alleged in the petition, the plaintiff may not controvert such allegations of fact in the State Court, but the Federal Court alone has jurisdiction to determine any issues of fact thereby raised. *Carson v. Durham,* 121 U. S., 421; *R. R. v. Daughtry,* 138 U. S., 298; *Huntley v. Express Co.,* 191 N. C., 696.

But a general allegation of bad faith, or a mere denial of the allegations contained in the complaint, will not do. *Lloyd v. R. R.,* 162 N. C., 485. In order to warrant a removal on the ground of an alleged fraudulent joinder, the petition must contain a statement of the relevant facts and circumstances, with sufficient minuteness of detail, and be of such kind, as rightly to engender or compel the conclusion that the joinder has been made in bad faith and without right. *Fore v. Tanning Co.,* 175 N. C., 583. The petition must not only allege a fraudulent joinder or one made in bad faith, "but the showing must consist of a statement of facts rightly leading to that conclusion, apart from the pleader's deductions." *Wilson v. Iron Co.,* 257 U. S., 92. The position should appear as a conclusion of law from the facts stated in the petition. *R. R. v. Willard,* 220 U. S., 413.

In *R. R. v. Cockrell,* 232 U. S., 146, it was held that a mere allegation of a fraudulent joinder was not enough, but there must be "a statement of facts rightly engendering that conclusion"; and further that "merely to traverse the allegations upon which the liability of the resident defendant is rested, or to apply the epithet 'fraudulent' to the joinder will not suffice; the showing must be such as compels the conclusion that the joinder is without right and made in bad faith." And in *R. R. v. Sheegog,* 215 U. S., 308, it was said: "On the other hand, the mere epithet 'fraudulent' in a petition does not end the matter. In the case of a tort which gives rise to a joint and several liability, the plaintiff has an absolute right to elect and to sue the *tort-feasors* jointly if he sees fit, no matter what his motive, and therefore an allegation that the joinder of one of the defendants was fraudulent, without other ground for the charge than that its only purpose was to prevent removal, would be bad on its face." To like effect is the decision in *Patton v. Fibre Co.,* 192 N. C., 48.

Speaking to the question in *Lloyd v. R. R.,* 162 N. C., 485, *Hoke, J.,* delivering the opinion of the Court, said: "On this question the authorities are to the effect that when viewed as a legal proposition the plaintiff is entitled to have his cause of action considered as he has presented it in his complaint *(R. R. v. Miller,* 217 U. S., 209; *R. R. v. Thompson,* 200 U. S., 206; *Dougherty v. R. R.,* 126 Fed., 239), and

while a case may in proper instances be removed on the ground of false and fraudulent allegation of jurisdictional facts, the right does not exist, nor is the question raised by general allegation of bad faith, but only when, in addition to the positive allegation of fraud, there is full and direct statement of the facts and circumstances of the transaction sufficient, if true, to demonstrate 'that the adverse party is making a fraudulent attempt to impose upon the Court and so deprive the applicant of his right of removal.' *Rea v. Mirror Co.,* 158 N. C., 24-27, and authorities cited, notably, *R. R. v. Herman,* 187 U. S., 63; *Foster v. Gas and Electric Co.,* 185 Fed., 979; *Shane v. Electric Ry.,* 150 Fed., 801; *Knutts v. Electric Ry.,* 148 Fed., 73; *Thomas v. R. R.,* 147 Fed., 83; *Hough v. R. R.,* 144 N. C., 701; *Tobacco Co. v. Tobacco Co.,* 144 N. C., 352; *R. R. v. Houchins,* 121 Ky., 526; *R. R. v. Gruzzle,* 124 Ga., 735.

"True, it is now uniformly held that when a verified petition for removal is filed, accompanied by a proper bond, and same contains facts sufficient to require a removal under the law, the jurisdiction of the State court is at an end. And in such case it is not for the State court to pass upon or decide the issues of fact so raised, but it may only consider and determine the sufficiency of the petition and the bond. *Herrick v. R. R.,* 158 N. C., 307; *Chesapeake v. McCabe,* 213 U. S., 207; *Wecker v. Natural Enameling Co.,* 204 U. S., 176, etc. But this position obtains only as to such issues of fact as control and determine the right of removal, and on an application for removal by reason of fraudulent joinder such an issue is not presented by merely stating the facts of the occurrence showing a right to remove, even though accompanied by general averment of fraud or bad faith, but, as heretofore stated, there must be full and direct statement of facts, sufficient, if true, to establish or demonstrate the fraudulent purpose. *Hough v. R. R.,* 144 N. C., 692; *Tobacco Co. v. Tobacco Co.,* 144 N. C., 352; *Shane v. R. R.,* 150 Fed., 801."

When the motion to remove is made on the ground of an alleged fraudulent joinder, the petitioner is entitled to have the question determined on the face of the record, so far as the State Court is concerned, and, for this purpose the allegations of the petition are to be taken as true. There can be no doubt "that the allegations of fact, so far as material, in a petition to remove, if controverted, must be tried in the Court of the United States, and therefore must be taken to be true when they fall to be considered in the State courts." *R. R. v. Sheegog,* 215 U. S., 308.

Speaking to the question in *Chehore v. Ohio, etc., Ry. Co.,* 131 U. S., 240, *Mr. Justice Harlan,* delivering the opinion of the Court, said: "Upon the filing by either party, or by any one or more of the plaintiffs

or defendants, *'entitled* to remove any suit,' mentioned in the first or second sections of the act of 3 March, 1875, 18 Stat. 470, of the petition and bond required by its third section, 'it shall *then* be the duty of the State Court to accept said petition and bond, and proceed no further in such suit.' The effect of filing the required petition and bond in a removable case is, as said in *Railroad v. Mississippi,* 102 U. S., 135, 141, that the State Court is thereafter 'without jurisdiction' to proceed further in the suit; or in *Railroad Co. v. Koontz,* 104 U. S., 5, 14, its rightful jurisdiction comes to 'an end'; or, in *Steamship Co. v. Tugman,* 106 U. S., 118, 122, 'upon the filing, therefore, of the petition and the bond—the suit being removable under the statute—the jurisdiction of the State Court absolutely ceased, and that of the Circuit Court of the United States immediately attached.' It has, also, been repeatedly held, particularly in *Stone v. South Carolina,* 117 U. S., 430, 432, following substantially *Railroad Co. v. Koontz,* that 'a State Court is not bound to surrender its jurisdiction of the suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer'; and that, 'the mere filing of a petition for the removal of a suit, which is not removable, does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record, and the necessary security having been given, the power of the State Court in the case ends, and that of the Circuit Court begins.' These decisions were in line with *Insurance Co. v. Pechner,* 95 U. S., 183, 185, arisng under the judiciary act of 1789, in which it was held that a 'petition for removal when filed becomes a part of the record in the cause'; that the party seeking the removal should state 'facts which, taken in connection with such as already appear, entitle him to transfer'; and that if he fails in this, he has not, in law, shown to the Court that it cannot 'proceed further with the cause.'

"It thus appears that a case is not, in law, removed from the State Court, upon the ground that it involves a controversy between citizens of different states, unless, at the time the application for removal is made, the record, upon its face, shows it to be one that is removable. We say, upon its face, because 'the State Court is only at liberty to inquire whether, on the face of the record, a case has been made which requires it to proceed no further'; and 'all issues of fact made upon the petition for removal must be tried in the Circuit Court.' *Stone v. South Carolina,* 117 U. S., 430, 432; *Carson v. Hyatt,* 118 U. S., 279, 287."

It is the holding of a number of cases that the filing of a petition for removal on the ground of an alleged fraudulent joinder, when ac-

companied by proper bond, presents to the State Court only the question of the sufficiency of the petition. *Traction Co. v. Mining Co.,* 196 U. S., 239; *R. R. v. Dunn,* 122 U. S., 513; *Carson v. Hyatt,* 118 U. S., 279; *Stone v. South Carolina,* 117 U. S., 430; *Steamship Co. v. Tugman,* 106 U. S., 118.

In *Cogdill v. Clayton,* 170 N. C., 526, the rules deducible from the authorities are stated by *Allen, J.,* with his usual clearness, as follows:

"1. That the petition for removal must state the facts upon which the motion is based, and not mere conclusions.

"2. That the petition is insufficient if it does no more than deny the cause of action alleged in the complaint.

"3. That the State court has jurisdiction for the purpose of determining if the facts alleged present a removable cause.

"4. That the State courts cannot inquire into and decide as to the truthfulness of the facts alleged in the petition.

"5. That if the facts alleged in the petition are sufficient to justify a removal, it is the duty of the courts of the State to make the order for the removal, and that it is for the Federal Court to inquire into and determine the truth of the facts alleged upon a motion by the plaintiff in the Federal Court to remand to the State Court. *Herrick v. R. R.,* 158 N. C., 307; *Rea v. Mirror Co.,* 158 N. C., 28; *Hyder v. R. R.,* 167 N. C., 588; *R. R. v. Cockrill,* 232 U. S., 146."

If the plaintiff has a right to sue one or more of the resident defendants jointly with the nonresident defendant and even though such resident defendant be joined solely for the purpose of defeating a removal, still such joinder cannot be said to be fraudulent in law, for the law will not give an absolute right and then declare its use or exercise a fraud. When the liability of the defendants is joint, as well as several, the plaintiff may, at his election, sue both, and no motive can make his choice a fraud. *R. R. v. Sheegog, supra.*

Here, the plaintiff has sued the Champion Fibre Company and its "General Superintendent of Wood Operation," C. S. Badgett, alleging a breach of one of the master's nondelegable duties, to wit, the duty in the exercise of ordinary care, to furnish plaintiff's intestate a reasonably safe place to work and reasonably safe tools and appliances with which to do the work assigned to him, which failure, it is alleged, continued after promise on the part of the wood superintendent to remedy, following complaint made by plaintiff's intestate and other employees. The performance of this duty was committed to C. S. Badgett. Hence, in this respect, if no other, he was the *alter ego,* or vice-principal of the master. *Tanner v. Lumber Co.,* 140 N. C., 475.

Speaking to the question in *Shives v. Cotton Mills,* 151 N. C., 290, *Brown, J.,* delivering the opinion of the Court, said: "The duty of

providing (in the exercise of ordinary care) a reasonably safe place in which to work is one of the primary or absolute duties of the master; and when the master delegates the discharge of such duty to a servant, whether he be called foreman, a superintendent, or what not, he represents the master, and the latter will be held responsible for the manner in which the duty is discharged."

Whenever it is sought to hold the master liable for the act or neglect of his servant, the question first to be considered is whether the negligence complained of relates to anything which it was the duty of the master to do. If it does, then the master is equally liable with the servant for he must see, at his peril, that his obligations to the workmen are properly discharged. *Ross v. Walker,* 139 Pa., 42; *Cook v. Mfg. Co.,* 182 N. C., 205;; *S. c.,* 183 N. C., 48.

The plaintiff, then, it would appear, had a right to join C. S. Badgett as a party defendant, and, although the plaintiff might have elected to sue the defendants separately, they are also liable to him jointly. *Hough v. R. R.,* 144 N. C., 692. This was so at common law, as well as now. *R. R. v. Dixon,* 179 U. S., 137; *Alpha Mills v. Engine Co.,* 116 N. C., 797.

The facts alleged in the petition for removal neither compel nor point unerringly to the conclusion that the joinder in the instant case is a fraudulent one and made without right.

We hold, therefore:

1. That when a motion to remove a suit or action from the State Court to the District Court of the United States for trial is made on the ground of an alleged separable controversy, the question of separability is to be determined by the manner in which the plaintiff has elected to state his cause of action, whether separately or jointly, and, for this purpose, the allegations of the complaint are controlling. *Morganton v. Hutton,* 187 N. C., 736.

2. That when the motion to remove is made on the ground of an alleged fraudulent joinder, the petitioner is entitled to have the State court decide the question on the face of the record, taking, for this purpose, the allegations of the petition to be true. To warrant a removal in such case, however, the facts alleged in the petition must lead unerringly to the conclusion, or rightly engender and compel the conclusion, as a matter of law, aside from the deductions of the pleader, that the joinder is a fraudulent one in law and made without right. *Fore v. Tanning Co.,* 175 N. C., 584.

3. That, viewed in the light of the above principles, the record in the instant case fails to disclose a right of removal.

Reversed.

OVERMAN & COMPANY, INC., v. MARYLAND CASUALTY COMPANY, INC.

(Filed 12 January, 1927.)

1. **Roads and Highways — State Highway Commission — Principal and Surety—Contracts—"Materials."**

Where a surety is obligated under the provisions of its bond with the State Highway Commission to pay for the labor and material used in the construction of a State highway in default of the contractor to do so, and the road in question is through a section of the county making it desirable as a good business proposition, and in conformity with general usage of like contractors under the same or substantially the same conditions: *Held*, supplies of groceries furnished for the consumption of the laborers; gas and oil necessarily used for the machinery employed in its construction, and food for the teams engaged in the project, come within the intent and meaning of the words "materials used in the construction of the road," for the payment of which the surety is liable under its contract.

2. **Same—What Are Not Necessaries.**

Candies, cigars, cigarettes, ginger ale and other soft drinks sold by the contractor at a laborers' camp in the construction of a highway for the State Highway Commission to be paid for by the contractor and charged in the pay roll against the laborers buying them, are not necessaries under the terms of the surety bond of the contract.

3. **Statutes—Roads and Highways — State Highway Commission — Presumption—Prospective Effect—Presenting Claims.**

3 C. S., 3846(v), making void a claim for material furnished the contractor for the building of a State highway, unless the claimant has presented it in writing, etc., to the State Highway Commission within six months after the completion of the work, and making such failure a bar to the claimant's right to recover, falls within the rule of presumption that the effect of the statute is to be prospective only, in the absence of an expressed or clearly implied intent to the contrary.

4. **Same.**

And where the contract between the contractor and the State Highway Commission specified that payment thereunder shall be due at a certain time, the statute has no application if its operative effect is fixed therein for a later date.

APPEAL by both plaintiff and defendant from *McElroy, J.*, at September Term, 1926 of ROWAN. No error.

The plaintiff is a corporation engaged in the wholesale feed and grocery business, with its office in Salisbury, N. C. The defendant is a surety company. The plaintiff brought this action against defendant, the surety company, on a construction bond given by Elliott & Sons to the highway commission, to recover the aggregate sum of $2,675.01.

The evidence of plaintiff was to the effect that the work required by the contract made it necessary for Elliott & Sons to keep an average

number of 75 laborers or hands, 65 horses and mules, 14 trucks, and 2 motor cars on the job. It was necessary for the contractors to maintain a camp and commissary at the place of work to shelter and board their hands and care for their horses and mules. Such was the general custom and usage among highway contractors in the State.

During the period between 30 January, 1922, and 2 February, 1923, plaintiff sold and delivered to Elliott & Sons $11,517.10 worth of materials, of which there remains unpaid the sum of $2,675.01. All of these goods were used and wholly consumed in and about the construction of project 525 and were necessary thereto. Plaintiff supplied the camp with the greater part of its needs during the time that this link of the State Highway System was under construction. The account is for part of the goods furnished up to 2 February, 1923.

Project No. 525 began in the city of Lexington, ran through a sparsely settled country, and ended in the open country near the Rowan County line and on the bank of the Yadkin River. It neither ran through nor came near to any town or village during the whole of its course. The undisputed evidence shows that there was no town or village of any consequence other than Lexington (Thomasville was 8 miles beyond Lexington and inaccessible) in Davidson County. From the place of work the best and nearest detour was the State highway detour, a distance of about 15 miles. It was impossible to travel over the regular route to Lexington while construction was going on. In Rowan County the town of Spencer was 4 miles from the nearest place of work, and 14 miles from the furthest place of work. Salisbury was 7 miles from the nearest place of work, and 17 miles from the furthest place of work. To go from Rowan County to any part of the place of work it was necessary to go over a toll bridge over the Yadkin River, the toll being fifty cents a round trip for a truck or motor car.

The hands used by Elliott & Sons were brought mostly from Georgia and South Carolina as Elliott & Sons could not obtain the necessary force in this State without undergoing the danger of home ties keeping the camp force perpetually depleted, for the further away from home they were the more likely would it be that they would stay in camp and work. It was impossible to care for the hands any other way than by maintaining a camp for them. Sam Elliott, witness for plaintiff, testified to the effect that was the satisfactory and businesslike method of handling the men, for if they were not handled that way "you could not get the hands bunched together of a morning."

Elliott & Sons provided in the camp all those things usually used and provided in such camps, including a comparatively small quantity of tobacco and confections. The testimony was to the effect that unless such materials were supplied the negroes would not stay in camp, and

that it was the custom and usage of highway contractors to provide their hands with tobacco and confections. All such supplies and all groceries and provisions used by the men were charged up to them and taken out of their wages. Elliott & Sons first charged the hands $4.00 per week for board, but, finding they were losing money at that rate, raised it later to $4.50. This always went as part of the weekly payroll.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Did plaintiff furnish Elliott & Sons hay, grain and foodstuffs for their horses and mules which was used and consumed in and about the construction of project No. 525, as alleged in the complaint, and, if so, what was the amount thereof? Answer: Yes, $1,007.43.

2. Was said hay, grain and foodstuffs necessary in the construction of project No. 525, as alleged in the complaint? Answer: Yes.

3. Did plaintiff furnish Elliott & Sons oils and gas for their trucks and motor cars which was used and consumed in and about the construction of the work on project No. 525, as alleged in the complaint, and, if so, what was the amount thereof? Answer: Yes, $203.91.

4. Was said oil and gas necessary for the construction of the work on project No. 525, as alleged in the complaint? Answer: Yes.

5. Did plaintiff sell and deliver to Elliott & Sons candies, cigars, cigarettes, tobacco, ginger ale and other soft drinks, and if so, what was the amount thereof? Answer: Yes, $549.34.

6. Were said candies, cigars, cigarettes, tobacco, ginger ale and other soft drinks used in and about the construction of the work on project No. 525? Answer: Yes.

7. Were said candies, cigars, cigarettes, tobacco, ginger ale and other soft drinks necessary? Answer: No.

8. Was it necessary for Elliott & Sons to maintain a camp and board and feed their hands as alleged in the complaint? Answer: Yes.

9. During the time that Elliott & Sons were engaged in the construction of project No. 525, was it the custom and usage of highway contractors to maintain a camp and commissary and board and feed their hands on construction projects similar to project No. 525? Answer: Yes.

10. Did plaintiff furnish Elliott & Sons with groceries and provisions which were used and consumed in said camp in and about the construction of project No. 525, as alleged in the complaint? Answer: Yes.

11. If so, what was the amount of groceries and provisions sold Elliott & Sons by plaintiff? Answer: $914.33.

12. What was the date of the last item in plaintiff's account against Elliott & Sons? Answer: 1 April, 1923.

13. Is plaintiff barred by section 3 of chapter 160 of the Public Laws of 1923, as alleged in the answer? Answer: No.

14. Is plaintiff barred by the decree entered in the Federal Court, as alleged in the answer? Answer: No.

15. In what sum is the defendant indebted to the plaintiff? Answer: $2,125.67, with interest from 1 April, 1923."

The other material facts will be set forth in the opinion.

Lee Overman Gregory for plaintiff.
Craige & Craige and Manning & Manning for defendant.

CLARKSON, J. Elliott & Sons and R. E. Boggs, the contractors, with the Maryland Casualty Company, on 14 December, 1921, gave a bond to the State Highway Commission in the sum of $146,540.00. The material conditions of the bond, to be considered in this action, were:

(1) "For the improvement of a certain section of highway known as State Highway Project No. 525, road between Lexington and Rowan County line, beginning at station 0-00 and ending at station 541-12, situated in the county of Davidson, North Carolina, being approximately 10.24 miles long, approximately estimated to cost $293,080."

(2) "And shall well and truly, in a manner satisfactory to the State Highway Engineer, complete the work contracted for . . . and shall well and truly pay all and every person furnishing material or performing any labor in and about the construction of said roadway, all and every sum or sums of money, due him, them, or any of them, for all such labor and materials, for which the contractor is liable."

There are only three main questions presented:

(1) Defendant introduced no evidence, and at the close of plaintiff's evidence moved for judgment as in case of nonsuit. C. S., 567. The court below denied the motion and defendant assigned error. In this we think the court below correct.

(2) Were said candies, cigars, cigarettes, tobacco, ginger ale and other soft drinks, "materials furnished," within the meaning of the contract and bond?

(3) Is plaintiff barred by section 3 of chapter 160 of the Public Laws of 1923, as alleged in the answer?

In *Brogan v. National Surety Co.,* 246 U. S., 257, the Court said: "As shown by these cases, the act and the bonds given under it, must be construed liberally for the protection of those who furnish labor or materials for the prosecution of public work." This rule of construction was adopted by this Court in *Plyler v. Elliott,* 191 N. C., 54, in a case similar to the one at bar. The plaintiffs in both cases are wholesale grocers of Salisbury, and both of them sold Elliott & Sons materials for use in their construction camp on State Highway Project No. 525.

In *Cornelius v. Lampton,* 189 N. C., at p. 718, this Court said, in reference to the exact words of this bond: "It will be noted that the contract is elastic, it covers 'furnishing material or performing labor in and about the construction of said roadway.' "

The general basis of liability is necessity.

In *Aderholt v. Condon,* 189 N. C., at p. 755, this Court said: "The bond was to pay for labor and material for which all the contractors were liable." This standard of liability, in *Plyler v. Elliott, supra,* required that the materials must have been necessary. In *Gravel Co. v. Casualty Co.,* 191 N. C., at 317, it was said: "The material was, therefore, 'furnished' to the contractor, and, hence of necessity the contractor was liable for the purchase price. Therefore, the contractor being liable, the bond, by its express terms, guaranteed payment."

On all the issues submitted to them the jury found that all of the goods sold Elliott & Sons by plaintiff were necessary and that they were wholly consumed in and about the construction of the work on the project, except the 7th issue as to candies, cigars, cigarettes, tobacco, ginger ale and other soft drinks, which the court below instructed them to answer "No"—that they were not necessities.

(A) *Groceries and provisions:*

The following cases hold that groceries and provisions furnished to the contractor and necessarily consumed in and about the construction of the work are protected by the bond: *Plyler v. Elliott, supra,* 131 S. E., 306; *Brogan v. Nat. Surety Co.,* 246 U. S., 257, 62 L. Ed., 703, L. R. A., 1918d 776; *Fidelity Deposit Co. of Md. v. Bailey* (Va.), 133 S. E., 797; *Southern Surety Co. v. Bank* (Texas), 275 S. W., 436; *Clatsop County v. Feldschau* (Ore.), 196 Pac., 379.

(B) *Hay and Grain:*

The following cases establish that foodstuffs for the horses and mules furnished to the contractor and necessarily consumed in and about the construction of the work is protected by the bond. *Plyler v. Elliott, supra,* 131 S. E., 306; *Early & Daniel v. Surety Co.* (Fourth Circuit), 5 Fed. (2d Series), 670; *U. S., etc., v. Lowrance* (8th Circuit), 252 Fed., 122; *Franzen v. Surety Co.* (Wyo.), 245 Pac. 30; *Chappell v. Surety Co.,* 191 N. C., 703, 133 S. E., 21.

(C) *Gasoline and Lubricating Oil:*

This Court has never directly held that gas and oil are covered by the bond, although the case of *Cornelius v. Lampton,* 189 N. C., 714, by analogy settles the question. In that case "the man power is exchanged for the electric power." The following cases hold that gas and oil necessarily consumed in and about the construction of the work, and for which the contractor is liable, are protected by the bond.

State, etc., U. S. F. & G. Co., 10 Ohio App., 141; *Bartles-Scott Oil Co. v. Western Surety Co.* (Minn.), 200 N. W., 937; *Smith v. Oosting* (Mich.), 203 N. W., 131; *Oil Co. v. Commary-Peterson Co.,* (Cal.), 163 Pac., 702; *Fuller v. Brooks* (Okla.), 246 Pac., 369.

We come now to consider "were said candies, cigars, cigarettes, tobacco, ginger ale and other soft drinks necessary" within the meaning of the bond?

Necessary, defined by Webster: "Impossible to be otherwise, or to be dispensed with, without preventing the attainment of a desired result; indispensable; requisite; essential."

We would not term them necessaries or luxuries. They are in the twilight zone. In the *Plyler case, supra,* the testimony of Sam Elliott in regard to tobacco, etc., was: "The few items of tobacco, cigarettes and candy included in the account sued on here were deducted from their wages. *I guess they had to have these things.*" This matter was not passed on in that case. We said, at p. 60: "For this reason, the question of the liability of defendant, Surety Company, as to provisions furnished to the hands, the necessity, and the amount due for feedstuffs must be submitted to a jury to determine the facts, unless the facts can be agreed upon." As a matter of law, we cannot hold that they were necessary to be furnished under the language of the bond. In fact, the Court, in *Clatsop County v. Feldschau, supra,* speaking to the subject says: "We are of the opinion that tobacco, cigars and cigarettes furnished the men cannot be deemed supplies or provisions necessary to the prosecution of the work, and this item . . . is disallowed."

The final proposition: "Is plaintiff barred by section 3 of chapter 160, Public Laws of 1923, as alleged in the answer?" We cannot so hold. That project No. 525 was finished on 31 August, 1923, and that no work was done on it thereafter, but that final estimates were made by the State Highway Commission on 4 September, 1923, is undisputed on the record.

The plaintiff offered in evidence the general provisions of the contract, including sections 71 and 73, as follows: *"Final Payment:* Whenever the improvement provided for by the contract shall have been completely performed on the part of the contractor, and all parts of the work have been approved by the engineer, according to the contract, a final estimate showing the value of the work will be prepared by the engineer as soon as the necessary measurements can be made, all prior certificates of estimates upon which payments have been made being approximate only and subject to correction in the final payment. The amount of this estimate, less any sums that may have been deducted or

retained under the provisions of the contract, will be paid to the contractor within 30 days after the final estimate is forwarded by the engineer, provided that the contractor has properly maintained the road as hereinafter specified. *Maintenance:* The contractor shall maintain the road in first-class condition for 30 days after it is completed, and 15% of the final estimate will be retained by the State Highway Commission to enforce this requirement; except that the engineer may, in his discretion, release the contractor from the further maintenance of sections of the road, not less than two miles in length, which have been satisfactorily maintained under traffic for at least 30 days, unless otherwise provided in 'Special Provisions.'"

Public Laws 1923, section 3, chapter 160 (amendment adding another paragraph to Public Laws, 1921, chapter 2, section 15), is as follows:

"Section 3. Amend section fifteen by adding another paragraph, which shall read as follows: 'Whenever any contractor engaged in working upon the State highway, and under contract with the State Highway Commission, shall incur liability for labor, material or other cause, and for which such contractor, or his bondsmen, may be liable, all such claims shall be presented in writing to said commission within six months after the completion of said work, and failure to file such claim within said time shall be a complete bar against recovery from said commission or any bondsmen: *Provided,* that this section shall not be in force and effect until six months from the ratification of this act.'" Ratified 3 March, 1923. 3 C. S., 3846(v).

Is this act prospective or retrospective? We think it prospective. The matter is clearly stated in 25 R. C. L., p. 786, part sec. 35, under "Statutes": "Every law that takes away or impairs rights that have vested under existing laws is generally unjust and may be oppressive. Hence such laws have always been looked on with disfavor. . . . While the Constitution of the United States and the constitutions of many of the states contain no provisions directly forbidding retrospective laws, such laws are void if they impair the obligations of contracts or vested rights. Even though the Legislature may have the power to enact retrospective laws, a construction which gives to a statute a retroactive operation is not favored, and such effect will not be given unless it is distinctly expressed or clearly and necessarily implied that the statute is to have a retroactive effect. There is always a presumption that statutes are intended to operate prospectively only, and words ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied.

Every reasonable doubt is resolved against a retroactive operation of a statute." *Hicks v. Kearney,* 189 N. C., 316, and cases cited: *Comrs. v. Blue,* 190 N. C., 638 and cases cited. See *State Prison v. Bonding Co.,* 192 N. C., at p. 394, construing this act.

In *Trust Co. v. Highway Com.,* 190 N. C., p. 680, at p. 683, it is held: "An action on a bond given to the State Highway Commission, commenced since 10 September, 1925, must be brought in one of the counties in which the work and labor was done and performed, and not elsewhere; only one action may now be brought on such bond. Reference is made to said chapter 260, Public Laws 1925, for the procedure in such action. This statute amends, not C. S., 2445, but chapter 2, Public Laws of 1921, which is the State Highway Act. *It does not apply to actions commenced prior to 10 September, 1925.*"

The language of the contract is, "whenever *the improvement* provided for by the contract shall have been *completely performed,*" etc., then provision is made for approval by engineer, final estimate, payment, etc. We think, under the contract, that the improvement was completely performed on 31 August, 1923. The record discloses that no other improvements were made after that date. We think it would be "sticking in the bark" under the language of the contract to hold the work was not completed until approved by engineer, etc., although that was done after the improvement or work was already completed. Under the surety bond, the work contracted for was to be completed in a manner satisfactory to the State Highway Engineer. On 31 August, 1923, the work was completed. On 4 September, 1923, the final estimate and acceptance was made. J. W. Jenkins, the resident engineer for the Highway Commission, in his testimony, says: "I began work there in December, 1921, and stayed there until the *work was completed the last of August, 1923.*"

The statute became operative on 3 September, 1923, after the work was completed and a day before the final estimates and acceptance was made. Under the facts and circumstances of this case, we think the act was prospective—the work was completed before the act went into effect and the act has no application.

The excellent brief of plaintiff's counsel has been helpful.

We can find in the judgment below

No error.

RONALD GREENE v. JOHN A. BECHTEL.

(Filed 26 January, 1927.)

1. Contract—Writing—Parol Evidence.

Where a contract not required by law to be in writing rests partly in parol, it is competent to show that part of the agreement of the parties not reduced to writing, when it does not vary, alter, or contradict the written part.

2. Arbitration and Award—Estoppel — Extraneous Matters — Actions—Fraud—Architects.

Where an architect for the erection of a hotel has agreed that his compensation shall be paid partly in cash and partly in stock of a certain corporation to be formed for a land development by the owner, and under the terms of the contract an arbitration has been had awarding him so much in cash and so much in stock therein, and the defendant sets up the award as final, upon the plaintiff's allegation of fraud, it may be shown by him that the defendant had not conveyed the land to the corporation designated according to his agreement, but to another corporation, and that the shares designated in the award were worthless in consequence.

3. Arbitration and Award — Optional With Either Party — Contracts—Actions.

Where a contract provides for arbitration in case of a dispute as to compensation between the owner of a building and his architect, to be demanded at the option of either party, the architect may maintain his action on the contract for services rendered by him thereunder, when neither party has exercised this right.

4. Same—Pleadings—Amendments — Objections and Exceptions — Contracts—Arbitration—Fraud.

Where the defendant in an action upon contract defends solely upon the plaintiff's estoppel by an award by arbitration therein provided for, and without exception the court has allowed the plaintiff to amend by setting up fraud resting by parol in connection with the subject, the defendant may not successfully resist judgment for plaintiff under the amended complaint.

5. Appeal and Error—Issues—Objections and Exceptions.

Where the issues submitted by the court to the jury are fully determinative of the controversy without prejudice to either party, affording them opportunity to introduce all legal evidence properly involved in the controversy, and are sufficient to support a judgment, the appellant may not complain that other issues should have been submitted without being aptly tendered to the court.

6. Actions—Damages—Evidence—Value of Lands Before and After a Time Fixed.

Where the reasonable market value of lands is relevant to the issue as to plaintiff's damages at a certain time, such value before and after that time, within reason, is competent.

GREENE *v.* BECHTEL.

APPEAL from *Stack, J.,* and a jury, at Fall Term, 1926, of BUNCOMBE. No error.

This was a civil action instituted by the plaintiff against the defendant on 24 September, 1925, to recover $12,775.00 architect fees alleged to be due the plaintiff by the defendant under a written contract dated 8 April, 1924. The defendant denied the claim and set up as a further defense and as a bar to the action, the stipulation in this written contract to the effect that in case of dispute the matter should be submitted to arbitration, etc., and that therefore this case could not be maintained. The plaintiff thereupon agreed to arbitration, and the matter in dispute was arbitrated and the arbitrators filed their award, awarding the plaintiff $2,406.25 cash, and $3,456.25 in stock, of the Land O'Sky Development Company. The plaintiff thereupon filed amended complaint and demanded the whole amount in cash and the defendant filed answer and denied that he was due the entire amount in cash, and tendered the amount of money and the amount of stock, according to the award of the arbitrators, which plaintiff declined.

The issues submitted to the jury and their answers thereto were as follows:

"1. Did the plaintiff and defendant make and enter into the written contract of 8 April, 1924, as alleged in the answer? Answer: (By consent) Yes.

"2. Was the plaintiff induced to enter into the contract with the defendant and to perform said contract as architect, upon the parol agreement by the defendant, made at the time of the written contract, that he would convey the Stradley Mountain lands (described in pleadings and of which defendant was owner of one-half undivided interest) to the LaFayette Development Company (successor to the 'Land O'Sky Company') for capital stock in the corporation, on the basis of $400 valuation per acre for the 420 acres of land, as alleged in the complaint? Answer: Yes.

"3. If so, did defendant fail to convey said land to the LaFayette Development Company (successor to 'Land O'Sky Development Company') and thereby breach his contract with plaintiff, as alleged in the amended answer? Answer: Yes.

"4. What damages, if any, is plaintiff entitled to recover? Answer: $3,450.00 with interest."

There was a judgment on the verdict, numerous assignments of error were made and appeal to Supreme Court.

Additional facts will be set forth in the opinion.

Clinton K. Hughes and Mark W. Brown for plaintiff.

Thomas S. Rollins for defendant.

CLARKSON, J. The plaintiff is an architect and was employed by defendant to perform certain professional services, which "consist of the necessary conferences, the preparation of preliminary studies, working drawings, specifications, large scale and detail drawings," etc.

The defendant was to erect a hotel building on Stradley Mountain, on certain land adjoining Pisgah Forest, seven miles from Asheville, N. C., on the Brevard Road.

Plaintiff and defendant on 8 April, 1924, signed the "Standard Form of Agreement between owner and Architect." On 2 October, 1925, the defendant wrote plaintiff: "Under the contract entered into between us on 8 April, 1924, it was expressly provided that: '14. Arbitration: All questions in dispute under this agreement shall be submitted to arbitration at the choice of either party,' etc. . . . This contract was signed by you and me, and a dispute having arisen between us in regard to what compensation, if any, you are entitled to for services alleged to be rendered to me, I hereby demand an arbitration as provided by our contract," etc.

The award was: "We award the plaintiff, Ronald Greene, six thousand nine hundred twelve dollars and fifty cents ($6,912.50), which amount under the terms of the contract is payable 50 per cent in cash and 50 per cent in the stock of the Land O'Sky Development Company. We calculate that the said Ronald Greene should now receive three thousand four hundred and fifty-six dollars and twenty-five cents ($3,456.25) in cash, less one thousand and fifty dollars ($1,050) previously paid in cash by the said John A Bechtel, making the cash settlement now due two thousand four hundred six dollars and twenty-five cents ($2,406.25) and the stock settlement three thousand four hundred and fifty-six dollars and twenty-five cents ($3,456.25), as per contract."

The award was unanimous and signed on 27 October, 1925. Without exception, the record shows that on 18 November, 1925, the following order was made after reciting the award: "And that defendant has failed to comply with the terms and conditions of said award: It is ordered that plaintiff be allowed to file an amended complaint to the end that there may be a final determination of all matters in controversy between the parties and defendant is allowed twenty days thereafter in which to file answer."

Plaintiff filed amended complaint on 20 November, 1925, and charged actionable fraud against the defendant. Plaintiff alleged, in substance, that, during the pendency of the action, there was an arbitration and award; that defendant had failed to comply with the terms of the award; that plaintiff was induced to enter into the contract with defendant and to accept stock in the Land O'Sky Development Company for one-half of the amount to which he was entitled for services rendered

upon the assurance and representation by defendant that the Stradley Mountain lands would be conveyed by defendant to the corporation at $400 an acre for an equal amount of par value capital stock in the corporation, and after securing plaintiff's services on the faith of that assurance, the defendant had fraudulently failed and refused to comply with his promise, and had fraudulently conveyed the lands to Stradley Mountain, Incorporated, and as a result the Land O'Sky Development Company or LaFayette Development Company, had no assets whatever; had never organized; had never had any meetings; had "never issued any capital stock, and if plaintiff should be required to accept worthless stock of said corporation for his services so rendered upon the faith of the false and fraudulent representations made by the defendant, the plaintiff would suffer great and irreparable injury." And it was further alleged that if defendant had complied with his agreement and had conveyed the lands to the corporation chartered for that purpose, the stock to which plaintiff was entitled under the award would have been worth in excess of $3,456.25. There is no question about the award in money, but the controversy was over the $3,456.25 stock in the Land O'Sky Development Company.

These allegations were denied by defendant, who says that he is ready, able and willing to comply with the terms of the award and tendered the cash and stock, but plaintiff refused and declined to accept the stock, but has expressed a willingness to accept the money—pleads estoppel, the arbitration and award in bar of the action.

There was conflicting evidence, the jury deciding the issues in favor of plaintiff.

The defendant contends, as a matter of law, that the action cannot be maintained; that the answer to the first issue ended the case as the contract provided that the decision of the arbitrators "shall be a condition precedent to any right of legal action," but the Court submitted three additional issues over the objection and exception of the defendant.

On the other hand, plaintiff contends that the contract provided "Half of the fee to be paid in cash and half in the stock of the Land O'Sky Development Company"; that the written contract only fixed how this money is to be paid, that is, in cash and in stock; but he says there was a further part of the agreement in parol; that the stock that he was to get should be in the Land O'Sky Development Company, and that the defendant agreed that he would convey to that particular company 420 acres of land at a certain value; and he says that that part of the contract was not reduced to writing. . . . The plaintiff further contends that in violation of that parol agreement, the defendant did not convey the 420 acres of land to the Land O'Sky Development Company, or its successors, the LaFayette Development Company, but that he con-

veyed it to another corporation, the Stradley Mountain, Incorporated; that he thereby rendered the stock in the Land O'Sky Development Company worthless; that it was never organized; no stock in it of any value.

The defendant requested the court to charge the jury, "That in no view of the evidence is the plaintiff entitled to recover." This the court refused to do, and in this we think there was no error. This, we consider, is the main contention. The question of arbitration is not material now. That is, "water that has passed over the tail race." The cases cited by defendant we need not consider—there was an arbitration and award.

The court below charged the jury, to which there was no exception, as follows: "When a contract is written, the law will not allow it to be altered, varied from that, or contradicted by parol evidence. When they put their contract in writing, that is the contract, but when a part of the contract is written and a part of it is in parol or verbal, and the verbal part does not alter, vary or contradict the written part, then the party claiming that parol agreement may show it by parol evidence. That if the alleged parol contract in this case was made as claimed that it does not contradict or alter Exhibit A (the agreement between plaintiff and defendant) and may be shown by verbal evidence; that the alleged contract, if made at all, was not within an express agreement, and the plaintiff would not be estopped to set it up by the award of the arbitrators. As the Court construes the written contract between the parties, the arbitration was to fix the amount and the kind of compensation that the plaintiff was to receive, and it does not embrace any further agreement in regard to conveying land to a certain corporation, and, therefore, parol evidence of any such alleged agreement would not vary, alter or contradict the written contract in this case. The arbitration settled the amount of what the plaintiff is entitled to recover, so much cash and so much stock."

Under the facts and circumstances of this case we think the charge correct. In *Anderson v. Nichols,* 187 N. C., at p. 809, citing numerous authorities, it is held: "If the entire contract is not required in writing it may be partly written and partly oral; and in such case if the written contract be put in evidence the oral part also may be proved, if not at variance with the written instrument. It was competent to show that the title to the furniture was to vest in the defendant under the oral agreement, because it was not in conflict with the deed." *Faust v. Rohr,* 167 N. C., p. 360; *Miller v. Farmers Federation,* 192 N. C., 144.

It will be noted under Article 14 of the agreement it says: "All questions in dispute under the agreement shall be submitted to arbitration

at the choice of either party." The plaintiff had the right to institute the action without demanding arbitration. After the action was instituted, the defendant chose arbitration and the arbitration and award was "as per contract." There was no exception to the order allowing the amended complaint. The defendant answered and plead estoppel and the arbitration and award in bar. On the parol part of the contract, which is denied, he did not, if he could, ask for arbitration. This aspect was not considered by either party before the arbitrators. The case was tried out on the theory as set forth in the issues, the defendant lost and cannot now complain to this Court. *Shipp v. Stage Line,* 192 N. C., p. 475.

In *Warren v. Susman,* 168 N. C., at p. 462, it is held: "It is suggested, though, with much confidence, that plaintiff made a binding and irrevocable election in the original complaint, and, therefore, the amendment, which is inconsistent with and repugnant to it, cannot be considered; but no such objection was taken to the pleading by motion to strike out, demurrer, or in any other regular way, which is necessary to raise such a question; and, too, defendant, by not objecting, consented to the amendment and agreed to the submission of the issue as to the value of the land."

The defendant chose for himself the field of Waterloo—he lost the battle.

The witness testified as to the reasonable market value of the land on 8 April, 1924, the date of the contract, and was asked its value 24 September, 1925, when it was conveyed to Stradley Mountain, Inc. We think this evidence somewhat elastic, but competent.

In *DeLaney v. Henderson-Gilmer Co.,* 192 N. C., at p. 652, it was held: "Proof of its value within a reasonable time under the circumstances of the particular case, before and after the injury is competent. *Newsom v. Cothrane,* 185 N. C., p. 161; 8 R. C. L., 487-8-9." In any aspect it was cured on cross-examination. *Cook v. Mebane,* 191 N. C., p. 1.

If the defendant did not consider the issues submitted by the court proper or relevant, it was his duty to tender other issues, and having failed to do so, he cannot now complain. In *Gross v. McBrayer,* 159 N. C., at p. 374, citing numerous authorities, it is said: "Plaintiff objected to these issues, but tendered no issues himself. It seems to us that the issue submitted by the court were those made by the pleadings, and if the plaintiff desired any other issue, he should have tendered it. When issues embrace the real matters in dispute and afford an opportunity for the parties to present and develop their contentions, and, when answered, are sufficient to determine the rights of the litigants and to support the judgment, they are sufficient within the requirement

of the statute." *Erskine v. Motor Co.*, 187 N. C., p. 826; *Hooper v. Trust Co.*, 190 N. C., p. 423.

It appears to us on the record, and the jury so found, that the justness and merit of the controversy was with the plaintiff.

From a careful review of the entire record, we can find no prejudicial or reversible error.

No error.

L. P. LONDON, JR., v. COMMISSIONERS FOR YANCEY COUNTY.

(Filed 26 January, 1927.)

1. Counties—Highways—Contracts—County Commissioners— Corporate Action—Minutes.

In an action against the county by a road contractor for additional compensation under an alleged agreement that the county commissioners would pay the contractor an additional amount to the contract price for a material change made in the location of a highway, it must be shown by the plaintiff that the commission acted in their official capacity at a lawful meeting held by them by resolution properly passed, though not necessarily recorded upon the minutes of their meeting.

2. Same—Evidence—Remand.

Held, upon the record of this appeal there was no sufficient evidence that the county commissioners acted in their corporate capacity in contracting to pay an additional sum for the change made in the relocation of the county highway, and the case is remanded.

3. Appeal and Error—Reference—Evidence—Findings of Fact—Review.

When exceptions have been filed to the referee's report and thereupon the judge finds the facts upon such exceptions, such findings are not reviewable in the Supreme Court on appeal if there is evidence to support them.

CIVIL ACTION before *Stack, J.*, at March Term, 1926, of YANCEY.

The plaintiff instituted an action against the defendants alleging that he was awarded a contract by the defendant to build a public road or highway in said county, and that after he had entered upon the work under said contract that the defendant stopped "the construction of the road as staked, and arbitrarily and unreasonably ordered the plaintiff to take a new and entirely different route." . . . Plaintiff refused to make this change under the terms of the contract, and so notified the defendant. "Whereupon, at a meeting between the plaintiff and the defendant . . . it was agreed between the plaintiff and the defendant that the plaintiff should build the road as changed, which was an entirely new road over a new route, and that the additional expense and loss of time, expense involved in maintaining the equipment and organi-

zation should be allowed to the plaintiff and that he should be paid for the same in a just and reasonable settlement to be had between the parties after the construction of said road."

The plaintiff further alleged that he completed the work and that there is now due him $698.00 on the contract, and that there is due him an additional sum of $5,238.59 for other work, loss of time and expense incurred by reason of said change in the contract.

The defendant denied that any material change had been made in the contract and denied that the county commissioners of Yancey County had made any new contract to compensate plaintiff for any changes in the work. The defendants admit that they owe the plaintiff the sum of $698, and tendered judgment for that amount.

The cause was referred to a referee, who heard all the testimony, and thereafter submitted his report, containing his findings of fact and conclusions of law. Exceptions were filed to the referee's report, and the cause came on for hearing before the trial judge.

The judgment of the trial judge is as follows:

"This cause coming on for hearing before the undersigned judge holding the courts of the Eighteenth Judicial District, and being heard upon the report of the referee and the plaintiff's exceptions thereto; and the plaintiff upon his motion being allowed to make additional exceptions to findings of fact, this Court reviewed the whole cause and finds as follows:

1. In addition to findings of fact No. 4, this court finds that plaintiff's bid was made and let for the excavation for the whole of the road contracted for as staked by the State Engineer and shown to the plaintiff by the representative of the county.

2. As to paragraph No. 5, to which the plaintiff was allowed to make additional exceptions, the said finding is overruled in so far as it is found that the commissioners promised to give plaintiff only 'all his contract called for,' and it is found that the commissioners by their action and action of the engineer and by their acquiescence in the written statement of the plaintiff, and by requiring the plaintiff to build the road upon a new route contracted to compensate him for his additional expense and loss by reason of such requirement.

3. Finding No. 9 is approved, except the last clause, which is overruled and reversed.

4. Finding of fact No. 11 is reversed in so far as it conflicts with the further findings herein in the foregoing and subsequent paragraphs.

5. The last paragraph in finding 13 is overruled, and it is here found that such requirement of the engineer without compensation to the plaintiff was arbitrary and without regard to rights of plaintiff. It is further found in relation thereto that the change was to the great ad-

vantage of the county, resulted in the saving of more than six thousand dollars, and was reasonably worth to the county the sum of $2,400 in addition to the amount allowed by the engineer under the original contract price.

6. Paragraph No. 14 is confirmed, except in so far as it holds that the plaintiff is not entitled to recover the $2,400 there stated, and is entitled to recover only $698, as to which finding the same is reversed and overruled.

7. I find as a fact that the work of the plaintiff required to be done by the engineer and representatives of the county on the road as changed from the stakes to the new route was a material change, not in contemplation of the parties under the contract, required a large additional expense in amount equal to the amount allowed herein, was of advantage much greater to the county than the amount here allowed, and was reasonably worth such amount, and the plaintiff was entitled to recover therefor the sum of $2,400, and the further sum of $698, with interest on last amount from 13 June, 1923.

Upon the foregoing facts I find as a matter of law that the plaintiff is entitled to recover the said two sums of $2,400 and $698, with interest on the $698, as above, and the cost of this action, including $100 allowed the referee and including $125 heretofore advanced by the plaintiff, all of which shall be taxed by the clerk."

Pless, Winborne & Pless for plaintiff.
Charles Hutchins for defendant.

BROGDEN, J. When exceptions have been filed to a referee's report and thereunder the judge finds the facts upon such exceptions, such findings are not reviewable in the Supreme Court, if there is evidence to support them. *Miller v. Groome,* 109 N. C., 148; *Dumas v. Morrison,* 175 N. C., 431; *Caldwell v. Robinson,* 179 N. C., 518; *Hardy v. Thornton,* 192 N. C., 296; *Greer v. Comrs.,* 192 N. C., 714.

The referee found as a fact: "No action was ever taken by the board of commissioners, acting as a body or in meeting assembled, changing or modifying the written contract."

The judge overruled this finding of fact and found as follows:

"And it is found that the commissioners, by their action and the action of the engineer and by their acquiescence in the written statement of plaintiff, and by requiring the plaintiff to build the road upon a new route contracted to compensate him for his additional expense and loss by reason of such requirement."

The only question therefore to be determined is whether there is evidence to support this finding of fact, that the board of county commissioners made a supplemental contract with the plaintiff.

Certain letters are referred to in the record as exhibits. None of these exhibits, however, have been put in the record, and we are unable to determine their probative value. A printed form of the contract is also sent, but there is nothing inserted in the blanks to enable us to determine what the written contract itself provided, other than the statements of witnesses.

C. S., 1290, provides that the powers delegated to counties by statute "can only be exercised by the board of commissioners or in pursuance of a resolution adopted by them." No resolution providing for the supplemental contract alleged by the plaintiff appears in the record. The fact, however, that a resolution was not actually spread upon the minutes would not be conclusive. *Hearne v. Comrs.,* 188 N. C., 45. But in order to make a valid and binding contract upon the county, the commissioners must act in their corporate capacity in a meeting duly held as prescribed by law. *Hearne v. Comrs.,* 188 N. C., 45; *Fore v. Feimster,* 171 N. C., 551; *Wright v. Kinney,* 123 N. C., 618.

Did the commissioners act in their official capacity upon the question of this supplemental contract?

The plaintiff testified: "The change, taking me away from the stakes, was made before we reached station 120, through the board of commissioners. . . . I came to see the commissioners myself once or twice and explained the circumstances to them. Mr. Wheeler, Mr. Proffitt and Mr. Thomas, the commissioners, came down to the work to make their decision; that is, they agreed to do so, so as to untie me and let me go on. They did not decide that day, and put it off till 17 March in order to make a trip to Raleigh to see whether the State would accept it on the opposite side of the creek. They came back, and I met them on 19 March again, and they decided at that time and gave me a letter of instruction to carry to Mr. Smith and his crew to proceed on the State survey. Mr. Smith arranged the meeting for us on the first Monday in March with the commissioners or the first Monday in April, . . . and we met in Mr. Smith's office, and Mr. Smith told Mr. Wheeler, chairman of the board of commissioners, and who was actively dealing with this road for the commissioners. Mr. Smith stated the situation to Mr. Wheeler. Others of the board were present, but he was talking generally to Mr. Wheeler, and told him I objected to the change. . . . We argued awhile and Wheeler agreed he would bring his board and come down the next week, and if I was justly due any compensation he would give it to me."

It appears then that there was some conversation between members of the board of county commissioners and the plaintiff in Mr. Smith's office. It does not appear whether this was a regular meeting of the board of county commissioners or not, or whether the commissioners at

the time were acting in their official capacity, or whether the letter of instructions referred to was authorized by the board, or as to what the contents of these various letters were. In this uncertain state of the record we are unwilling to determine the rights of the parties. If the board of commissioners of Yancey County were duly assembled and made the alleged agreement with the plaintiff, or if the board authorized its chairman or any other person to give a letter of instructions directing the work to be changed, and agreeing to pay a fair compensation therefor, then the plaintiff is entitled to recover the amount allowed.

The cause is remanded to the Superior Court of Yancey County for specific findings of fact as to whether the board of commissioners of said county, in their corporate capacity, made the supplemental contract or authorized the chairman or any other persons to make it.

Remanded.

WESTERN CAROLINA POWER COMPANY v. GEORGE W. HAYES AND HIS WIFE, SARAH HAYES.

(Filed 26 January, 1927.)

1. Pleadings—Discretion of Court—Amendments—Appeal and Error.

The trial court in its discretion may allow the respondent to a petition to condemn his lands to be taken by a *quasi*-public corporation unless it is made to appear on appeal that this discretion has been abused.

2. Eminent Domain—Condemnation—Damages.

In proceedings for the taking of a part of the respondent's farming land in condemnation by a *quasi*-public corporation for the purpose of building a dam and ponding water thereon, the respondent may recover as his damages not only the value of the land so taken at the institution of the proceedings, but also damages to the remainder of the tract caused by the ponding of water upon the part so used.

3. Same—Evidence—Time At Which Damages Are to be Ascertained.

The respondent in proceedings to condemn his lands for ponding water thereon, may introduce evidence of its market value before and after the work had been commenced when relevant to its value at the time of the institution of the proceedings.

4. Condemnation—Damages—Issues.

Where damages for the taking of the owner's lands by condemnation are to be ascertained in the proceedings, the better practice is suggested that a separate issue be submitted to the jury upon each distinctive element thereof.

POWER CO. *v.* HAYES.

APPEAL by petitioner from *Lane, J.*, at May Term, 1926, of CALDWELL. No error.

Proceeding for condemnation of land. The issue submitted to the jury was answered as follows:

"What compensation are the defendants, Geo. W. Hayes, and his wife, justly entitled to recover of the petitioner on account of the taking of the land described in the petition, and as compensation for the injury, if any, to the remaining land? Answer: $5,125.00."

Judgment was rendered upon this verdict, first, that respondents recover of petitioner the sum of five thousand one hundred twenty-five dollars ($5,125), with interest from 17 May, 1926, until paid; second, that petitioner, upon payment of said sum, interest and cost, shall be permitted to enter upon, hold and use the land described in the petition; and third, that respondents shall thereupon be divested and barred of all right, interest and estate in said land. From this judgment petitioner appealed to the Supreme Court.

W. S. O'B. Robinson, Jr., W. C. Newland and Squires & Whisnant for petitioner.

E. B. Cline, C. E. Cowan and R. L. Huffman for respondents.

CONNOR, J. This proceeding to condemn land under the right of eminent domain was begun on 28 May, 1924. The petitioner seeks to acquire thereby land owned by respondents for the purpose of impounding water thereon by means of a dam. The land sought to be condemned, as described in the petition, contains 29.5 acres, and is part of a farm owned by respondents, containing in all 195 acres. At the time this proceeding was begun, the respondent, Geo. W. Hayes, had lived on this farm for more than fifty years; he is now about seventy-five years of age. The boundaries of the 29.5 acres run within about 80 feet of his dwelling-house, and within about 16 feet of a four-room tenant house on said farm. The spring from which he got water for domestic use is located about 200 feet from his house, and is within the boundaries of the land sought to be condemned by the petitioner. Said land was partly covered by water at the time of the trial. Since the commencement of this proceeding, respondents have moved off their farm, and have made their home elsewhere. More than two years have elapsed since the land was taken, under the right of eminent domain, conferred by the State upon petitioner; respondents have not yet received the just compensation to which they are entitled under the law.

The right of the petitioner, as an electric power company, to take said land and to impound water thereon, by means of a dam, upon making just compensation, is conceded. C. S., 1698. The only matter in

controversy is the sum which the petitioner shall be required to pay as compensation for the land taken, and as damages for the injury resulting from the taking of same and from its use for impounding water thereon, to the remaining land. The jury has assessed this sum at $5,125. The petitioner, upon its appeal to this Court, contends that it is entitled to a new trial of the issue for errors which it has duly assigned in the case on appeal.

The first assignment of error is based upon an exception to the order of the court permitting respondents to file an amended answer to the petition. The only effect of the amended answer filed on 8 September, 1924, is to increase the sum which respondents allege they are entitled to recover of petitioner as damages for injuries to their farm resulting from the taking therefrom of 29.5 acres, and impounding water thereon. In the original answer filed on 10 June, 1924, this sum is alleged as $1,500; in the amended answer, it is increased to $3,500. In both the original answer, and in the amended answer, it is alleged that the value of the 29.5 acres described in the petition is $2,950. Counsel for petitioner in their brief say: "Ordinarily, the action of the court in permitting an amended or supplemental pleading to be filed is not a proper subject for an exception. We contend, however, that the discretion of the court was abused in this case." We find no facts in the record to support this contention. The assignment of error is not sustained.

By other assignments of error, petitioner presents its contention that it was error for the court to admit as evidence, by overruling its objections thereto, testimony of witnesses as to the difference in value of the farm before and after water was impounded on the 29.5 acres described in the petition. The petitioner contends that the testimony should have been confined to the difference in value at the time the proceeding was begun.

The dam by which the water was impounded was in process of construction at the date of the commencement of the proceeding, to wit, 28 May, 1924. It was completed on or about 1 January, 1925; water was impounded on the land described in the petition during the spring of 1925. The action was tried upon appeal from the order of the clerk of the Superior Court, confirming the report of the commissioners, at May Term, 1926. There was evidence that subsequent to the commencement of the proceeding the value of the farm owned by respondents had increased; there was no evidence that such increase was caused by the construction of the dam or the impounding of water thereby. There was a general increase in land values in the neighborhood due to general conditions; respondent's lands shared in this general increase of land values.

Authoritative decisions of this and other courts are to the effect that the owner of land, a part of which is taken under the right of eminent domain, may recover as compensation not only the value of the land taken, but also the damages thereby caused, if any, to the remaining land. *R. R. v. Land Co.,* 137 N. C., 330, 68 L. R. A., 333; *United States v. Grizzard,* 219 U. S., 180, 55 L. Ed., 165. In the opinion in the last cited case, *Lurton, J.,* says: "Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, the injury due to the use to which the part appropriated is to be devoted."

It has also been held that for the purpose of determining the sum to be paid as compensation for land taken under the right of eminent domain, the value of the land taken should be ascertained as of the date of the taking, and that the land is taken within the meaning of this principle when the proceeding is begun. In *United States v. Chandler-Dunbar W. P. Co.,* 229 U. S., 51, 57 L. Ed., 1063, it is said: "The value should be fixed as of the date of the proceedings and with reference to the loss the owner sustains, considering the property in its condition and situation at the time it is taken and not as enhanced by the purpose for which it is taken." Upon the same principle if the land decreases in value after the commencement of the proceedings for its condemnation, this will not be considered in determining the sum which the owner is justly entitled to recover as compensation for its taking. "The fundamental doctrine that private property cannot be taken for public use, without just compensation, requires that the owner shall receive the market value of his property at the time of the taking, unaffected by any subsequent change in the condition of the property." 20 C. J., 826, sec. 262.

Respondents are entitled to recover as just compensation for the 29.5 acres of land described in the petition its value at the time it was taken, to wit, the date of the commencement of the proceeding. No change in the value of said land after said date, whether caused by the use for which it is to be condemned or not, can be considered in determining the amount which respondents shall receive and petitioner shall pay as just compensation for same. Respondents allege in their answer to the petition that the value of the land was $2,950. They offered evidence tending to sustain this allegation. Petitioner offered evidence that the value of the 29.5 acres did not exceed $75 per acre. The court submitted the contentions with respect to the value of the land actually taken to the jury, with full and correct instructions as to the law applicable to these contentions.

There was evidence sustaining the contention of respondents that the land included in their farm, remaining after the 29.5 acres had been taken by petitioner, was permanently injured by the impounding of water upon the land taken. This remaining land *was taken* for the purpose of determining the sum which respondents are entitled to receive and the petitioners should be required to pay, as compensation for such injuries, at the time water was impounded on the 29.5 acres. In his opinion in *Pumpelly v. Canal Co.,* 80 U. S., 166, 20 L. Ed., 557, *Justice Miller* says: "But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell in his work on water courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken." See Rose's Notes, Vol. 7, p. 645. It must follow that for the purpose of determining the compensation to be paid for the taking of the remaining land it is competent to show the difference in the value of such land before and after water was impounded on the land taken, which was a part of the entire tract owned by respondents. The assignments of error based upon exceptions to the admission as evidence of testimony as to the difference in the value of the land before and after the impounding of the water, cannot be sustained.

As said by *Judge Hoke* in *Powell v. R. R.,* 178 N. C., 243, the issue submitted to the jury was very largely one of fact with the pertinent testimony very restricted in its nature, and the court after a full and fair statement of the contentions of the parties concerning the matters involved in the issue, left it to the jury to determine the amount which respondents are entitled to receive and petitioner should be required to pay as just compensation, both for the 29.5 acres actually taken, and for the permanent injuries caused to the remaining land by the taking of the same. The assignment of error for that the court failed to instruct the jury as to the meaning of "market value," as to the manner in which they should arrive at a "reasonable, fair and just compensation," and as to the time when compensation or damages should be computed, cannot be sustained. The instructions contained in the charge to the jury meet all reasonable requirements of the law.

Where the aggregate sum which one party to an action or proceeding is entitled to recover of the other, is to be determined by the application of different principles of law, and there is evidence tending to establish facts to which such principles are applicable, respectively, we suggest that the better practice is to submit more than one issue to the jury, so that by the answer to each issue, the jury may determine the amount to be recovered for each element of damage to be included

in the total recovery. In the instant case, one issue was submitted, without objection from either petitioner or respondents. The court in the charge to the jury differentiated the facts and principles upon which respondents were entitled to recover compensation both for the land actually taken and for the permanent injuries caused to the remaining land by the taking of a part thereof, and using same for impounding water thereon. Separate issues, however, enable the parties to present their contentions both to the jury and to the court, with greater clarity.

We find no error; the judgment is affirmed.

No error.

H. M. IRWIN AND LILA G. IRWIN, HIS WIFE, v. CITY OF CHARLOTTE AND CHARLOTTE PARK AND RECREATION COMMISSION ET AL.

(Filed 26 January, 1927.)

1. **Deeds and Conveyances—Land Development—Maps—Streets—Parks—Equity—Estoppel—Judgments.**

The purchaser of land in a development of the owners, with registered plat showing the lands to be divided into blocks with streets, parks, etc., have the equitable right to the use of such streets, parks, etc., and such purchasers may be estopped from claiming such rights by their acts and conduct, as in this case by release and judgment to that effect.

2. **Dedication — Acceptance — Municipal Corporations — Withdrawal of Dedication—Statutes—Parks.**

The prospective dedication of streets, parks, etc., in the sale of a development of lands is not binding upon a city until acceptance, and neither the city nor the general public can acquire any rights thereunder against the owner of the land or purchasers from him where the offer of dedication has been withdrawn before acceptance, under the provisions of 3 C. S., 3846(rr).

CLARKSON, J., not sitting.

APPEAL by the city of Charlotte and the Charlotte Park and Recreation Commission from *Schenck, J.*, at the October Term, 1926, of MECKLENBURG.

The issues were answered as follows:

1. Was plat recorded in Book 195, p. 663, registered by or with the knowledge and consent of the plaintiffs? Answer: Yes.

2. Did plaintiffs make conveyances by reference to said map recorded in Book 195, p. 663? Answer: Yes.

3. Was the word "Park" placed upon the map recorded in Book 195, page 663, placed thereon by inadvertence or mistake? Answer: Yes.

4. Has the legal and equitable owner of every lot shown on the map recorded in Book 195, page 663, register of deeds office for Mecklenburg County, executed a release to H. M. Irwin or had judgment by default final taken against him? Answer: Yes.

5. Has the Southern Power Company or the city of Charlotte ever executed a release to H. M. Irwin or had judgment by default final taken against them or it? Answer: No.

6. Has the city of Charlotte ever adopted any resolution accepting any dedication of the property described in the complaint? Answer: No.

7. Has the city of Charlotte ever exercised any authority or control over the property described in the complaint? Answer: No.

8. Has the Charlotte Park and Recreation Commission or its predecessor, Charlotte Park and Tree Commission, ever passed any resolution accepting any alleged dedication of the property described in the complaint? Answer: No.

9. Has the Charlotte Park and Recreation Commission or its predecessor, Charlotte Park and Tree Commission, ever exercised any supervision or authority or control over the property described in the complaint? Answer: No.

10. Did the Charlotte Park and Tree Commission refuse to accept the offer of dedication made in May, 1905, by H. M. Irwin of the said property described in the complaint? Answer: Yes.

11. Has the plaintiff, H. M. Irwin, and his predecessors in title maintained an open, notorious, adverse and continuous possession of the property described in the complaint under known and visible boundaries for more than twenty years? Answer: Yes.

12. Did the public generally accept any alleged offer of dedication of the lands described in the complaint? Answer: No.

13. Did the public generally maintain an open, notorious, adverse and continuous possession of this property described in the complaint under known and visible boundaries for more than twenty years? Answer: No.

14. Was the paper-writing recorded in Book 591, page 526, in the office of the register of deeds for Mecklenburg County filed by H. M. Irwin on 6 August, 1925, as alleged in the complaint? Answer: Yes.

15. Was the map recorded in Map Book No. 3, page 47, in the office of the register of deeds for Mecklenburg County filed for record by H. M. Irwin in May, 1923? Answer: Yes.

It was thereupon adjudged that the plaintiff, H. M. Irwin, is the owner in fee of the land in controversy, free from any claim, right, title, interest, or easement of any nature whatsover, and that he recover his costs against the appealing defendants.

Preston & Ross for plaintiff.

Walter Clark for Irwin Place, Inc.

James A. Lockhart and Frank McNinch for the Board of School Commissioners of the City of Charlotte.

Fred B. Helms and H. L. Taylor for the City of Charlotte and the Charlotte Park and Recreation Commission.

ADAMS, J. Harriet M. Irwin devised all her property to her husband for life, directing that after his death it should be equally divided among her children. Partition was duly made and the plaintiff, H. M. Irwin, acquired title to the land in controversy. He and his wife thereafter contracted in writing to sell and convey this land to Irwin Place, Inc., and subsequently tendered a deed which was refused on the ground that the plaintiff had caused to be recorded in the office of the register of deeds a map of this and adjacent property showing lots, streets, alleys, and a park, and had thereby irrevocably dedicated the land in suit to be used as a park by the general public.

It is alleged, and there is evidence tending to show, that in May, 1905, the plaintiff and the other heirs of Harriet Irwin tendered the property in controversy to the Charlotte Park and Tree Commission (now the defendant Park and Recreation Commission) to be used as a city park, and that this tender, in like manner with one afterwards made, was declined, and that the plaintiff has since held the property claiming it as his own. The map was registered in 1905, before partition of the devised land was made. On 20 August, 1909, the children and devisees of Harriet Irwin executed a deed to the Durham and Murphy Land Company, covenanting that retained lots and the land on the north side of Sixth Street opposite the lots between Irwin Avenue and Sycamore Street should be subject, without exception as to the time of completing the buildings, to the conditions and restrictions contained in this conveyance, and in November, 1909, a revised map was registered. In answer to certain issues the jury found that the word "park" had been placed upon the registered map by inadvertence or mistake; that the owner of every lot shown on the registered map had been concluded as to the alleged easement either by executing a release or by judgment; that neither the city nor the Park Commission had ever accepted the alleged dedication or exercised any control over the property; that the plaintiff had had open, notorious, adverse, and continuous possession of the property under known and visible lines and boundaries for more than twenty years before the beginning of the action; and that the public had never accepted the offer of dedication. It was also found (issues 14 and 15) that the plaintiff had filed in the register's office a

map purporting to correct the inadvertence or mistake; also a declaration withdrawing the asserted dedication in accordance with the statute. 3 C. S., 3846(rr).

We understand it to be admitted that the board of school commissioners was made a party defendant only because it has contracted to purchase the land from the Irwin Place, Inc., and that the Park and Recreation Commission is interested, not by virtue of any special contractual relation, but because it is vested with the control and management of property in and near the city now used or afterward to be acquired and used for the purpose of a park. Private Laws 1905, ch. 32, sec. 9.

In the voluminous record there are many assignments of error, but the controlling principles are few and free from special perplexity. There are decisions which hold that where the owner lays his land off into lots and streets with a view to making sales in reference to them and causes a plat or map of the lots, streets, alleys and parks to be registered and executes deeds referring to the map as a part of the description he thereby dedicates the streets, alleys and parks to the use of those who purchase the lots and under some circumstances also to the use of the public. *Conrad v. Land Co.,* 126 N. C., 776; *Hughes v. Clark,* 134 N. C., 457. The reason of the rule is that the grantor induces purchasers to believe that the streets, alleys and parks will be kept open for their benefit; but the principle is equitable in its nature and is founded upon the idea that it would be at least unjust for the landowner to question or limit the right of his grantees to the privileges and easements expressly given or implied from his conduct. *Sexton v. Elizabeth City,* 169 N. C., 385. The doctrine is further elucidated in *Wittson v. Dowling,* 179 N. C., 542, in which it is said: "It is the recognized principle here and elsewhere that, when the owner of suburban property or other has the same platted, showing lots, parks, streets, alleys, etc., and sells off the lots or any of them, in reference to the plat, this, as between the parties, will constitute a dedication of the streets, etc., for public use, although not presently opened or accepted or used by the public. *Elizabeth City v. Commander,* 176 N. C., 26; *Wheeler v. Construction Co.,* 170 N. C., 427; *Green v. Miller,* 161 N. C., 25. In many of the cases on the subject, this is spoken of as an irrevocable dedication, but the principle is dependent on the doctrine of equitable estoppel, giving the purchaser who has bought and taken title in reference to the plat, to have the same observed in its integrity. It is through his position and by reason of it that the equity must be made effective, and so far as examined, in all the cases where this expression has been used, the purchasers, or some of them, were insisting on their rights in the matter, or were in a position to do so. *Green v.*

Miller, supra; Hughes v. Clark, 134 N. C., 457-463; *Collins v. Land Co.,* 128 N. C., 563; *Conrad v. Land Co.,* 126 N. C., 776; *S. v. Fisher,* 117 N. C., 733."

In addition it is said that so far as the general public may be concerned, without reference to the claims and equities of the individual purchaser, a dedication is never complete until acceptance; neither burdens nor benefits with attendant duties may be imposed upon the public unless in some proper way it has consented to assume them; and until acceptance is established it should be termed a revocable offer of dedication. This principle is controlling in view of the verdict and of the fact that each of the plaintiff's grantees is concluded, as stated, by judgment or release; from which it results that the defendants are not entitled to the property in question by virtue of the plaintiff's alleged dedication. This is the vital and decisive question, a minute discussion of which would involve an unnecessary repetition of decided cases and an unnecessary review of established principles.

An inspection of the record with reference to the specific assignments of error discloses no convincing reason for awarding a new trial, several of the assignments having been made no doubt as a matter of precaution. The seventh, to which the appellants attach importance, points out no reversible error, since in our opinion the verdict is sufficient to sustain the judgment independently of C. S., 3846(rr); and those numbered 23-30 relate to matters which it was not improper for the jury to consider on the question of dedication. Assignment 39 is addressed to a ruling which required counsel to file written powers of attorney. This order applied to all counsel appearing in the case, and we are unable to discover any just cause of complaint on the part of the appellants. The remaining assignments are to be determined by familiar principles and require no discussion.

We are satisfied that upon the record no reversible error appears.

No error.

CLARKSON, J., not sitting.

CORPORATION COMMISSION OF NORTH CAROLINA v. MERCHANTS BANK AND TRUST COMPANY ET AL.

(Filed 26 January, 1927.)

1. Banks and Banking—Receivers—Assessment of Stockholders—Assets—Liabilities.

The shareholders in an insolvent bank in the hands of a receiver may not be assessed by their additional liability to the par value of their shares until the value of the bank's assets in proportion to its debts has been ascertained.

2. Same—Officers—Mismanagement—Assets.

The right of action by the bank, and by its receiver, in case of insolvency for loss or depreciation of the bank's assets, due to their wilful or negligent failure to perform their official duties, is one enforceable for the benefit of the bank as well as for its creditors, and where the receiver has sued the shareholders of its stock for their additional or personal liability, the defendants setting up this defense as an asset of the bank, are entitled to have the officers' or directors' liability determined before the amount of their liability by assessment may be fixed. C. S., 237, 239, 240. 3 C. S., 219(a).

3. Same—Fraud—Misrepresentation in Sale of Shares.

Upon the issue raised in an action by the receiver of an insolvent bank to enforce individual or personal liability of its shareholders: *Held*, the defense that his subscription was obtained by the fraudulent representations of an officer of the bank as to its solvency, is controlled by *Chamberlain v. Trogden*, 148 N. C., 139.

APPEAL by defendants from *Oglesby, J.*, at September Term, 1926, of FORSYTH.

On 29 May, 1926, the Corporation Commission of North Carolina brought suit in the Superior Court of Forsyth County against the Merchants Bank and Trust Company of Winston-Salem, alleging its insolvency, and obtained an order appointing the Wachovia Bank and Trust Company temporary receiver of its assets, which appointment was later made permanent. Thereafter the receiver filed its report alleging "that the assets of the Merchants Bank and Trust Company are insufficient to discharge its obligations, and that it will be necessary to assess the shares of stock, issued by said bank, to the full amount allowed by law." Whereupon it was ordered that all the stockholders of the defunct bank be made parties defendant in this action, to the end that their liabilities might be ascertained and determined as the law directs. *Trust Co. v. Leggett,* 191 N. C., 362.

The said stockholders, in obedience to the order of court and in answer to the receiver's petition, do not deny their ultimate liability, but they allege that shortly after the organization of the Merchants Bank and Trust Company and continuously thereafter, the officers and directors of the said institution, through gross neglect and wilful mismanagement of the affairs of the corporation, brought about its insolvency and subsequent failure. Therefore they pray that all the officers and directors of said banking corporation, not already parties herein, be made parties to this proceeding and that the liability of said officers and directors be fixed and collected as an asset of the bank before any assessment is levied on the shares of stock held by the appellants herein.

It is further alleged by one of the defendants, E. J. Angelo, that some twelve months prior to the institution of this action, he was induced

through the fraudulent representations of an agent of the Merchants Bank and Trust Company to purchase ten shares of stock in said corporation and executed in payment thereof his note in the sum of $1,000, which he now asks to have canceled.

The trial court held that the matters and things set up in the answers of the defendants constitute no defense, either in law or in fact, to the complaint and petition of the receiver; whereupon judgment was rendered on the pleadings for the full "double liability" of the stockholders. From this judgment the stockholders appeal, assigning errors.

Manly, Hendren & Womble for Wachovia Bank and Trust Company, receiver.

Holton & Holton and Parrish & Deal for defendants.

STACY, C. J., after stating the case: The principal question presented is whether the stockholders of the Merchants Bank and Trust Company are entitled to have the tort liability of the officers and directors of said corporation ascertained, and collection enforced as far as possible, before determining what assessment, if any, should be made on the shares of stock issued by said bank and held by appellants at the time of its insolvency and failure. It is alleged by the defendants that, if this liability were reduced to judgment and collection enforced, the assets of the bank would be amply sufficient to discharge its obligations, thereby rendering it unnecessary to assess any portion of the stockholders' double liability under the statute.

That the right of action against the officers and directors of a banking corporation, for loss or depletion of the company's assets, due to their wilful or negligent failure to perform their official duties, is a right accruing to the bank, enforceable by the bank itself prior to insolvency, and hence enforceable by the receiver for the benefit of the bank, as well as for the benefit of its creditors, is the holding or rationale of all the decisions on the subject. *Douglass v. Dawson,* 190 N. C., 458; *Besseliew v. Brown,* 177 N. C., 65; *Bane v. Powell,* 192 N. C., 387; *Clark v. Bank,* 78 S. E. (W. Va.), 785.

That such right of action is an asset of the bank is also the uniform holding of the cases. *Clark v. Bank, supra; Benedum v. Bank,* 78 S. E. (W. Va.), 656. Bolles, in his Modern Law of Banking, vol. 2, pp. 821-822, classifies both the liability of the directors for gross mismanagement, and the double liability of stockholders, as assets in the hands of an insolvent bank for the benefit of its creditors.

This chose in action is an equitable asset in the sense that it is a right to recover for breach of trust, and it passes to the receiver along with the other assets of the bank. So long as the bank is able to pay

and does pay its creditors, no creditor can complain of the officers' or directors' breach of duty towards the bank. But when the bank becomes insolvent different principles come into play. Then the bank's assets are to be distributed ratably and equally among the creditors, having regard, of course, for priorities where they exist. Zane on Banks and Banking, sec. 86.

In *Hill v. Smathers,* 173 N. C., 642, it was said that the word "assets" as used in the statute "is broad enough to cover anything which is now or may be available to pay creditors"; but it was suggested that, as employed in the statute, the term was not intended to include the double liability of stockholders, or else the expression "other assets" would have been used, as such liability is given only for the benefit of creditors and not for the benefit of the corporation. "The liability provided by the statute against the stockholders is not, as we have seen, considered an asset or right of the corporation." *Jordan, C. J.,* in *Runner v. Dwiggins,* 147 Ind., 243. And in *Long v. Bank,* 90 N. C., 405, it was held that a suit on behalf of the creditors "could be brought, as soon as the corporation became insolvent, against it and the stockholders jointly, in order to secure the appropriation of its assets to its debts and other corporate liabilities, and then an assessment upon the stockholders within the limits of their obligation, to make up the deficiency to the creditors."

It was said in *Long v. Bank, supra,* in answer to the suggestion that the resources of the corporation should first be exhausted before having recourse to the remedy against stockholders, quoting with approval from *Terry v. Tubman,* 92 U. S., 156, that "the case is not so much like that of a guaranty of the *collection* of a debt where the previous proceeding against the principal debtor is implied, as it is like a guaranty of *payment* where resort may be had at once to the guarantor without a previous proceeding against the principal."

But since the decision in the *Long case,* the banking law has been amended, ch. 25, Public-Local Laws 1911, the pertinent provisions of which are now sections 239 and 240 of the Consolidated Statutes.

Construing the first of these sections in *Corporation Commission v. Bank,* 192 N. C., 366, *Connor, J.,* speaking for the Court, said:

"Assessments cannot be made, under the statute, until it has been adjudged, upon the facts found, that a deficiency exists, and until the amount thereof has been determined. The amount of the deficiency cannot be determined until the sum which the receiver will, at least probably, receive from the sale and collection of the assets of the insolvent bank has been found—there being no denial, as in the instant case—that the amount of the liabilities are as alleged by the receiver. In *Smathers v. Bank,* 135 N. C., 410, decided at Spring Term, 1904,

it was held that a contention that no assessment can be made until the assets are completely exhausted, could not be sustained; it is said, however, in the opinion in that case, that the extent of the stockholders' liability cannot be absolutely fixed until the status of the assets and liabilities has been ascertained. The decision in *Smathers v. Bank* is not an authority for the contention now made that the amount of the stockholders' indebtedness to the receiver, under C. S., 237, may be adjudged, without a finding, as to the value of the assets in the hands of the receiver, and not yet reduced to cash. Since the decision in *Smathers v. Bank*, the statute—C. S., 239—has been enacted. By its express terms, the amount of the deficiency between the liabilities and the assets shall be determined before assessments are made upon stockholders, in order to enforce their liability. For this purpose an accounting may be had in the original action, after the stockholders have been made parties defendant. An allegation as to the value of the assets in his hands by the receiver, denied by the stockholders in their answers, raises an issue of fact upon which stockholders are entitled to a trial by jury. . . . The amount of their indebtedness cannot be adjudged until this issue has been determined. *Jordan v. Farthing,* 117 N. C., 181; *Carr v. Askew,* 94 N. C., 194; *Ely v. Early,* 94 N. C., 1. It is necessary to find the fact involved in the issue in order that the accounting may be had."

True, the Court was there dealing with a controversy between the receiver and the stockholders as to the value of the physical assets in the hands of the receiver, but we perceive no difference in principle between that case and the one at bar. Whatever is an asset of the bank belongs to the receiver, and the stockholders are "individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation"—for the excess of obligations over assets—"to the extent of the par value of their stock in addition to the amount invested in such shares." 1 C. S., 237; 3 C. S., 219(a); *Litchfield v. Roper,* 192 N. C., 202.

Realizing, no doubt, that the change in the law might entail some delay in ultimately assessing the "double liability" of stockholders, it was provided in the same statute, now C. S., 240, that the receiver should have ten years, instead of three, within which to bring suits against the stockholders in order to reduce their stock-assessment liability to final judgment. *Litchfield v. Roper, supra.*

It is not contended by the defendants that the receiver must collect and disburse all the assets of the bank and only after the exhaustion of such assets can it proceed against the stockholders, but it is their contention that before any assessment of double liability can be made on the shares of stock issued by the bank it must first be ascertained and de

termined that the assets of the bank are insufficient to discharge its obligations. This contention would seem to be in accord with the statutes on the subject.

With respect to the additional defense of fraud, alleged to have been practiced by the agents of the corporation on E. J. Angelo, and for which he asks a cancellation of his note given for stock in the corporation, in view of the broad allegations contained in his answer, it would seem that the same should be determined according to the principles announced in *Chamberlain v. Trogden,* 148 N. C., 139, cited in a valuable note on the subject in 41 A. L. R., 674.

Under the law as now written, we think the trial court erred in sustaining the demurrer and entering judgment on the pleadings.

Error.

WACHOVIA BANK AND TRUST COMPANY, AS TRUSTEE UNDER THE WILL OF GWYN EDWARDS, DECEASED, AND ANNIE MAY DUNCAN, WHO WAS WIDOW OF GWYN EDWARDS, DECEASED, v. WILLIAM EDWARDS, MARK EDWARDS, GWENDOLYN EDWARDS, GARRETT EDWARDS AND GWYN EDWARDS, JR., MINORS, BY THEIR GUARDIAN AD LITEM, LEICESTER CHAPMAN, AND OTHERS NOT IN BEING WHO MAY HEREAFTER TAKE INTERESTS UNDER THE WILL OF GWYN EDWARDS, DECEASED.

(Filed 26 January, 1927.)

1. Wills—Trusts—Executors and Administrators—Courts—Actions.

Where trusts are imposed by will upon an executor and involve the construction of certain portions of a will, the executor may apply to the courts in their equitable jurisdiction for advice in the proper administration of the trusts.

2. Wills—Intent—Interpretation.

The entire will in its related parts will be construed as a whole to effectuate the testator's intention in the disposition of his property.

3. Same—Trusts—Powers of Sale—"Home Place"—Unimproved Nonincome Yielding Lots—Deeds and Conveyances.

Where a will expressly confers upon the executor and trustee therein named the right to sell the assets of the estate, reinvest the proceeds, etc., and expressly excludes from this power "income-yielding real estate": *Held,* the words excluding such real estate will not apply to nonincome producing lands such as a devise to the widow of the home place on which there are one or more unproductive lots, and the executor and the widow may sell the vacant lots and convey a good title.

APPEAL from *Lane, J.,* and a jury, at October Term, 1926, of BUNCOMBE. No error.

"The plaintiff, Wachovia Bank and Trust Company, seeks the advice and instruction of the court upon the following matters, to wit: Is said Wachovia Bank and Trust Company, trustee, authorized and empowered by the terms and provisions of the will of Gwyn Edwards, deceased, to sell and convey in fee simple the remainder interest after the life estate of Annie May Duncan, widow of Gwyn Edwards and devisees of the life estate under said will, in and to the real estate, or any part thereof, located at the intersection of Haywood Road and Louisiana Avenue, in the city of Asheville, Buncombe County, North Carolina, and known as the Gwyn Edwards home place? The complaint alleges that offers have been received for portions of said property which represent the reasonable and fair value thereof; that said property comprises about two acres of land, which is unimproved except for the residence of the testator, which is located on Louisiana Avenue at a distance of 105 feet or more from Haywood Road, so that the Haywood Road frontage to a depth of 105 feet is vacant property; that said property is located in a business section, and is quite valuable as a business property; that it would be for the best interest of the estate to sell the same and invest the proceeds, and that the prospective purchasers aforesaid have refused to accept deeds upon the ground that said property is income-producing real estate, and that the said Wachovia Bank and Trust Company, trustee, is not authorized and empowered under the terms of the will of Gwyn Edwards to sell income-producing real estate, but is expressly directed not to sell real estate of such description. The defendants are all the children of the testator and the plaintiff, Annie May Duncan, and defendants are all of the beneficiaries under said will."

It is admitted in the pleadings: "That said testator, at the time of his death, was the sole owner of that piece of real estate in the city of Asheville located at the corner of Haywood Road and Louisiana Avenue, consisting of about two acres, with a frontage on Haywood Road of 227 feet and a frontage on Louisiana Avenue of 388 feet; that there was prior to and at the time of the death of said testator, and there is now on said land, only the residence known as 18 Louisiana Avenue, and which fronts on said avenue, and which was used and occupied as the home of the testator and his family, and after testator's death was the home of his widow and children until the spring of 1923; that the part of said land lying between said residence and Haywood Road is vacant and unimproved and used only as a pasture in connection with said home."

On the trial the issues submitted to the jury and their answers thereto were as follows:

"1. Is the price for the property fronting on Haywood Street described in the complaint, to wit, $400 per front foot, fair and adequate price? Answer: Yes.

"2. Is the party making the offer able and willing to comply with his said offer and to perform the same? Answer: Yes."

There was ample evidence introduced on the hearing to warrant the answers to the above issues.

The terms of the will bearing on the controversy are Item 2, Item 3, subsections (i) and (j), and Item 4, which are as follows:

"Second. I devise and bequeath to my beloved wife, Annie May Edwards (now Duncan) the home I now occupy, known as No. 18 Louisiana Avenue, corner Haywood Road, consisting of about two acres, and all my household and kitchen furniture, and all personal effects in and around the home excepting moneys, bonds, notes and other securities, for her sole use and benefit for her natural life, and at her death said property is to go to my children, share and share alike, as provided for in the third item hereof. My said wife is to pay insurance, taxes, upkeep and repairs on said property out of her part of my estate and out of the moneys paid her of the net income from each child's part, as provided for in item third, subsection (c).

"Third. (i) I direct my trustee to sell and convert into cash all the real estate owned by me at my death jointly with W. E. Shuford or John Cole or any other person or persons, and invest the proceeds in good interest-bearing securities, such securities as are authorized by law for guardians and trustees, etc.

"(j) As a large part of my estate now consists of income-yielding real estate, and as it is my opinion that it will increase in value from year to year, it is my wish and I hereby direct that such real estate, excepting the real estate held jointly with others mentioned in subsection (i) be not sold, but be held by my trustee and turned over to my children, as, and when, hereinbefore directed.

"Fourth. I nominate, constitute and appoint the Wachovia Bank and Trust Company to be my executor of this my last will and testament, and full power and authority is hereby given the said executor to sell any real or personal property at public or private sale as may seem best and to make title to the same; to change or alter any investments of the estate or the trusts herein created, if the interests of the estate or the trust funds appear to be benefited thereby, special care being taken in all cases to avoid speculation and to insure safe and profitable investments, due regard being given by my trustee to the special instructions not to sell certain real estate and to limitations as to the class of investments in subsections (i) and (j) of item third. It is further my desire and I direct that the said Trust Company shall keep a clear, concise and separate record of all the transactions of the estate and the trusts herein created, which records shall at all times be subject to the free inspection of the heirs under this will or the beneficiaries under the

trusts above named, and the Trust Company shall receive as compensation the usual commissions allowed by law."

The widow, Annie May Duncan, joins the bank for the sale of the property.

From judgment in favor of plaintiffs, defendants assign error and appeal to the Supreme Court.

Bourne, Parker & Jones for plaintiffs.
Carter, Shuford and Hartshorn for defendants.

CLARKSON, J. In the construction of the will of Gwyn Edwards, plaintiff Wachovia Bank and Trust Company seeks the advice and instruction of the court. Under the facts of the case, we think it had this right.

"Ashe, J., in *Allsbrook v. Reid,* 89 N. C., p. 153, says: 'The former courts of equity entertained, and our Superior Courts still entertain applications for advice and instructions from executors and other trustees, as to the discharge of trusts confided to them, and incidentally thereto, the construction and legal effect of the instrument by which they are created. But the courts of equity never exercised this advisory jurisdiction when the estate devised is a legal one, and the question as to construction is purely legal. The jurisdiction is incident to that over trusts. Where there is no trust or trustee to be directed, the court of equity never takes jurisdiction.' *Bank v. Alexander,* 188 N. C., 670." *Ernul v. Ernul,* 191 N. C., at p. 349. See *Balsley v. Balsley,* 116 N. C., p. 472.

The sole question involved in the controversy is the meaning of "income-yielding real estate," as used in subsection (j) of the will of Gwyn Edwards.

The clause of the will which has given rise to this question is set forth above. The property in controversy is his "home place."

In construing a will, the intention of the testator must be ascertained from the instrument as a whole. 10 S. E. Digest (N. C. Ed.), at p. 13232, sec. 470, citing many North Carolina cases.

Full power and authority is expressly given to the trustee bank to sell and convert into cash the real estate owned jointly with others. The clear language of (j) is that he did not want his "income-yielding real estate" sold for the reason that in his opinion it would increase in value. He mentions the fact that a *large part* of his estate *now consists of income-yielding real estate,* recognizing that a part is not. The *large part*—the income-yielding—cannot be sold, the other can.

In *Corse et al. v. Chapman et al.,* 47 N. E. Reporter (N. Y.), at p. 814, it is said: "The appellants further urge as to the property No. 80 Jane Street, in the city of New York, that there was an unlawful sus-

pension of the power of alienation by reason of the life estate given the testator's widow therein. This life estate had nothing to do with the trusts created by the will, and was alienable at any time by the widow. *Bailey v. Bailey,* 97 N. Y., 470. . . . It is true that, while the testator gave an express power to sell his unimproved and unproductive real estate, he failed to provide in terms for a power to sell his productive real estate. It being essential to carry out the specific directions of the testator to divide his real estate into eight equal parts, it may well be that this duty, imposed upon the executors as trustees, carries with it the implied power to sell. We are of opinion that this is a proper construction of the will when read as a whole."

In *Foil v. Newsome,* 138 N. C., at p. 123, it was said: "We are also of the opinion that the trustee has by implication the power to sell the land for the purpose of converting it into an income-producing property. The usual rule adopted by the courts is to find in language imposing upon an executor or trustee the duty of disposing of a mixed fund or property, an implied power to sell real estate to the end that he may discharge such duty," citing cases. *Powell v. Wood,* 149 N. C., p. 235.

It appears from the admission in the pleadings and the evidence that the land in controversy has never produced any income. As we construe the will, the trustee bank is given full power and authority by clear implication, to sell the nonincome-yielding real estate.

We think the land, the "home place," can be sold under the language of the will, and in the judgment of the court below we can find

No error.

AMERICAN TRUST COMPANY, RECEIVER, v. UNITED CASH STORE COMPANY ET AL.

(Filed 26 January, 1927.)

1. Evidence — Hearsay — Letters — Appeal and Error — Trials — Error Cured.

Letters written by those who were not witnesses upon the trial are erroneously admitted as hearsay, but may not be considered so if they are thereafter used in evidence or referred to without further objection from the appellant.

2. Evidence—Issues—Fraud—Nonexpert Witnesses— Appeal and Error.

Where fraud in the procurement of a sale of stock is the issue in the action, it is reversible error, for which a new trial will be granted on appeal, for the defendant's witness to broadly testify that no fraud was practiced therein, it being a question for the sole determination of the jury, and not falling within the exception to the rule as to the admission of testimony of a nonexpert witness upon a collective fact.

CIVIL ACTION, before *Harding, J.*, at May Term, 1926, of MECKLENBURG.

On 13 May, 1922, the defendant, United Cash Store Co., executed and delivered a promissory note in words and figures as follows:

"On 1 January, after date, we promise to pay to the order of Automatic Safety Car Step Company four thousand and 00/100 dollars with interest thereon at the rate of six per cent per annum, payable annually from maturity of this note until paid. Each surety bond endorser herein waives notice of dishonor and presentment, notwithstanding any extension of time granted by principal. Value received."

The payee in said note, to wit, Automatic Safety Car Step Co., sold the note on 6 June, 1922, prior to its maturity to the Security Savings Bank. The plaintiff, American Trust Company, was appointed receiver for the Security Savings Bank in August, 1924, and brought this suit on said note as such receiver against the United Cash Store Co., Automatic Safety Car Step Co., L. L. Caudle, John S. Blake and Fred D. Blake. The Security Savings Bank paid $4,000 for the note. The defendant, United Cash Store Co., and the defendant, R. C. Newsom, contended that the note was secured by means of fraud and false representation, for that the defendant, L. L. Caudle, was attempting to sell the defendant stock in the Automatic Safety Car Step Co., and that the defendant, United Cash Store Co., purchased stock in said company and paid one thousand dollars in cash on the purchase price and executed said note for $4,000 for the balance of said purchase money. That at the time the said defendants purchased said stock the said salesman "falsely and fraudulently represented to the said R. C. Newsom that said Automatic Safety Car Step Company was a going concern and was solvent and did not owe anything, and had sufficient ready capital to carry on its business and to manufacture a certain safety automatic car step covered by patents which it owned; that the said corporation had a number of contracts calling for large quantities of car steps to be manufactured under said patents; that various railroad men and their organizations, and practically all of the important railroads in the United States, had decided to adopt the said car step. . . . That said corporation had acquired . . . a factory and equipment . . . which had been appraised at one-half million dollars. . . . That the total of the stock to be issued by said Automatic Safety Car Step Company, including that which had been issued, was restricted to $250,000. . . . That the stock which they proposed to sell to this defendant was very valuable and would pay large dividends out of profits to be made from contracts then in existence as soon as its factory could begin operation, which would be not later than 1 July of that year."

The defendant further alleged and contended that other representations were made at the time of securing said note, and that all of said representations were false and made with fraudulent intent of cheating and defrauding the defendant, and further, that said stock salesman had sold said stock to the defendant "without complying with the statutes of North Carolina, commonly known as the Blue Sky Law of said State."

The issues and answers of the jury thereto were as follows:

1. Was the execution of the note sued on procured by the false and fraudulent representations as alleged in the answer? Answer: No.

2. If so, did the plaintiff acquire said note in due course for value and before maturity without actual notice of said false and fraudulent representations? Answer: Yes.

3. At the time of the sale of stock, did the salesman of the Automatic Car Company deliver to the defendant a contract in accordance with section 6367 of Consolidated Statutes of North Carolina? Answer: No.

4. If not, did the plaintiff have notice of said fact? Answer: No.

5. At the time of the sale of said stock, was the Automatic Safety Car Step Company duly licensed to sell stock in North Carolina? Answer: No.

6. If not, did plaintiff at the time of acquiring said note have notice of said fact? Answer: No.

7. At the time of the sale of said stock was the agent making such sale duly licensed as a stock salesman under the laws of North Carolina? Answer: No.

8. If not, did the plaintiff at the time of acquiring said note have notice of such fact? Answer: No.

9. In what amount, if any, is defendant indebted to plaintiff on account of said note? Answer: $2,975.69.

H. C. Jones and Whitlock, Dockery & Shaw for plaintiff.
Stewart, McRae & Bobbitt and James A. Lockhart for defendant.

BROGDEN, J. The first assignment of error relates to the admission of a folder containing letters from railroad officials in regard to demonstrations of the car step and commendations thereof and estimates of value of the patent rights, together with letters from distinguished men, certifying to the good character of the officials of the Car Step Company. This testimony was incompetent as hearsay, but in several places in the record the contents of this folder were referred to by witnesses without objection, notably on pages 64, 75 and 87 of the printed record. So that, although the evidence was incompetent in the first instance, the subsequent references to it by both parties without objection cured the error in its admission. *Bryant v. Bryant,* 178 N. C., 77;

Stanley v. Lumber Co., 184 N. C., 302; *Cook v. Mebane,* 191 N. C., p. 1; *Willis v. New Bern,* 191 N. C., 507.

The second assignment of error was to the following question and answer, elicited from the witness, Caudle, who sold the stock to the defendant and secured the note in controversy: Q. Was there any fraud in connection with it? A. There was not.

The general rule in regard to the expression of opinion by a witness is thus stated in *Marks v. Cotton Mills,* 135 N. C., 289: "A witness should state facts, the jury should find the facts, and the court should declare and explain the law. The functions of the three within their several spheres are clearly defined and should always be kept separate and distinct. Whether the speeder was so constructed as that its operation was safe to the defendant's employees, was the very question upon which the parties were at issue and which the jury were impaneled to decide. The witness' opinion upon that question was incompetent and the plaintiff's objection to it should have been sustained." This principle was fully discussed and applied in *Marshall v. Tel. Co.,* 181 N. C., 292.

In the *Marshall case, supra,* the Court points out and discusses the exception to the general rule and the principle of law is thus declared: "There is, however, a well-recognized exception to the rule, and 'It includes the evidence of common observers testifying the results of their observations made at the time in regard to common appearances, facts and conditions which cannot be reproduced and made palpable to a jury.' *Britt v. R. R.,* 148 N. C., 41." And further, that "the exception has as its foundation, necessity arising from the difficulty, and frequently the impossibility of so placing a number of complicated facts before a jury that the proper deduction may be drawn from them, when a single statement conveying the impression on the mind of the witness of all the facts, the combination considered together constituting a fact, could be easily understood, and the exception is subject to the limitation that the opinion or inference of the witness must not be on the exact issue to be determined by the jury."

Again, quoting from McKelvy on Evidence, the opinion declares: "The admissibility of such evidence does not extend the case where it would not prove helpful to the jury nor where its application would carry the witness into an expression of real opinion upon matters which it is the jury's province to decide." And further: "And the jury ought to have been permitted to draw the inferences from the evidence instead of the witness."

The principle declared in the *Marshall case* was reaffirmed in an opinion by *Stacy, J.,* in *Stanley v. Lumber Co.,* 184 N. C., 307, as follows: "The jury alone was summoned and selected to pass upon this

question, and the witness should not have been permitted to express an opinion upon the very matter at issue between the parties." *S. v. Brodie,* 190 N. C., 554; *In re Craig,* 192 N. C., 656.

Applying these established principles to the exception presented by this record, we are constrained to hold that the exception is well founded and that the opinion of the witness ought to have been excluded from consideration by the jury.

The facts were not complicated but relatively simple, and there was no question involving the observation of complicated conditions. So that this case does not fall within the exception pointed out in the cases referred to. Then, too, the very point at issue in the case was whether or not the contract was vitiated by fraud. This was the very question for which the jury was impaneled to pass upon.

We are, therefore, compelled to hold that this testimony was incompetent and that the admission thereof constituted reversible error.

New trial.

RALPH ROSENBERG v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 26 January, 1927.)

Insurance, Life—Convertible Term Policies—Options—Premiums—Medical Examination.

Where an insurance company has issued a convertible term life insurance policy with privilege of exchange within a specified time, for a certain class of policy (of which it issued two kinds) continuously, and one gives a greater value to the insured than the other upon an increase of premium, without requiring another medical examination, an option as to the kind of these policies is given the insured, and he may elect to take the one of the greater value upon paying the additional premium, without a medical examination.

APPEAL by defendant from *T. J. Johnson, Emergency Judge,* at September Term, 1926, of BUNCOMBE. No error.

Action to enforce specific performance of options contained in certain ten-year term policies of insurance issued by defendant to plaintiff, by which plaintiff has the privilege of exchanging said term policies for other policies to be issued by defendant upon the Ordinary Life, Limited-Payment Life, or Endowment Plan. Plaintiff has complied with all the requirements for the exercise of said options, and has requested defendant to issue to him policies on the Ordinary Life Plan in exchange for his Term Policies.

Plaintiff contends that he is entitled to have included in said policies, or attached thereto, certain clauses; defendant admits that plaintiff is

entitled to policies on the Ordinary Life Plan, but denies that it is required by the terms of the contract to include said clauses therein or to attach same thereto.

Issues submitted to the jury were answered in accordance with the contentions of plaintiff. From judgment upon the verdict, defendant appealed to the Supreme Court.

Merrick, Barnard & Heazel for plaintiff.
Bourne, Parker & Jones for defendant.

CONNOR, J. On 22 August, 1919, defendant issued and delivered to plaintiff three policies of insurance, known as Ten-Year Term policies. Each policy was for the sum of $5,000; they were all in the same words and figures. Each contained a provision as follows:

"Privilege of Exchange for Other Form of Policy.

The insured (or assignee, if any) may at any time within seven years from the register date hereof, without medical reëxamination, exchange this policy for a policy for the same amount or any less amount, upon the Ordinary Life, Limited Payment Life, or Endowment plan upon any anniversary of this policy, or within the thirty-one days of grace, by surrendering this policy to the society at said home office, with written notice of the election and by paying the premiums to be fixed by the age on the birthday nearest to the date of such exchange according to the rates of the society then in force. On such exchange the society will apply 80 per cent of the net value of such part of this policy as is continued under another form as above, computed in accordance with the American Experience Table of Mortality, with 3 per cent interest per annum, together with all dividends and accumulations, toward the payment of premiums upon the new policy."

At the time plaintiff applied for said term policies defendant was issuing and selling, and it is now issuing and selling a policy of insurance, known as an "Ordinary Life Policy," to which are attached Disability and Double-Indemnity clauses, as alleged in the complaint.

Plaintiff has in all respects complied with the terms, stipulations, provisions and conditions of each of the three policies issued to him by defendant on 22 August, 1919, and said policies were in all respects, on 10 November, 1925, in full force and effect.

On or about 10 November, 1925, before the expiration of seven years from the register date of said policies, and after fully complying with all requirements in said policies therefor, plaintiff requested defendant to issue to him, in exchange for said Term Policies, a single policy for

the sum of $15,000, as of 15 November, 1925, that being the nearest premium date on said policies, on the Ordinary Life Plan, with a Disability clause and a Double-Indemnity clause, included therein or attached thereto. Defendant offered to issue to plaintiff, in exchange for said Term Policies, each for $5,000, a single policy for $15,000, on the Ordinary Life Plan, but without the clauses known as the "Disability Clause," and as "The Double-Indemnity Clause." Plaintiff declined to accept said policy, contending that he is entitled under the contract to a policy on the Ordinary Life Plan, with said clauses included therein or attached thereto. This contention of plaintiff is denied by defendant. The validity of this contention is the only matter in controversy to be determined by this action.

At the time plaintiff applied for the Term policies, in 1919, and at the time he requested defendant to issue to him, in exchange for said policies, a policy on the Ordinary Life Plan, in 1925, defendant was issuing and selling a policy of insurance, known as an "Ordinary Life Policy," containing Disability and Double-Indemnity clauses. It was also issuing and selling "Ordinary Life Policies," which did not contain these clauses. Policies containing these clauses were issued only to applicants therefor, who had passed required medical or physical examinations. An increased premium was charged by defendant for an Ordinary Life Policy containing the clauses. Plaintiff has offered to pay such increased premium, but was unable to pass the medical or physical examination required at the time he requested the exchange of policies.

It is expressly provided in the options under which plaintiff has the privilege of exchanging his Term Policies for policies upon another plan, that such privilege may be exercised "without medical reëxamination." Plaintiff having complied with all the terms and provisions of the options, and made his election pursuant thereto, is entitled to an "Ordinary Life Policy," such as defendant was issuing and selling both at the time the application was made for the Term Policies, and at the time the application was made for the exchange. His right to any form of such policy cannot be affected by his failure to submit to and pass a medical or physical examination. Such examination was expressly waived by defendant when it issued the Term Policies with the provision for an exchange of said policies for policies upon other plans, at the request of plaintiff.

Plaintiff is entitled not only to a policy upon the Ordinary Life Plan in exchange for his term policies; he is further entitled, at his election, and upon the payment of the premium charged therefor, to any form of such policy which defendant was issuing and selling both at the date of his application for the Term Policies, and at the date of his request for the exchange. Defendant admits in its answer to the complaint

that at both dates it was issuing and selling an Ordinary Life Policy, containing both a Disability Clause and a Double-Indemnity Clause.

It cannot be held as law that an insurance company which has contracted to issue and deliver a policy described in the contract by a general name, and which at the date of the contract issues such policy in two forms, one affording larger protection than the other, can perform its contract, or be discharged of liability thereon, by issuing a policy affording the less protection, when the person to be insured requests a policy affording the larger protection and offers to pay the premium charged therefor, the only consideration moving the company to issue one form of policy rather than the other being a difference in the premium. In such case, the person to be insured, and not the company, has the right of election.

The judgment from which defendant appealed may well have been rendered on the admissions in the pleadings. It is not necessary, therefore, to consider defendant's exceptions to the admission of evidence, over its objections, or to the instructions to the jury. Assignments of error, however, based upon these exceptions cannot be sustained. Evidence that defendant had issued Ordinary Life Policies, such as it had agreed to issue and deliver to plaintiff, in exchange for his Term Policies, with the Disability Clause and the Double-Indemnity Clause contained therein, was competent for the purpose of showing the form of policy to which plaintiff was entitled under the contract to have issued to him by defendant in exchange for his Term Policy. The term "Ordinary Life Policy," used in the written contract is ambiguous. We do not think that the court misconceived the nature and scope of the admission in defendant's answer, "that at said time this defendant did issue the said several kinds of life insurance policies above mentioned, and did attach to some of them, in certain special cases, when properly applied for, and in consideration of increased charges or premiums paid therefor, and upon other special considerations, a clause or clauses known as Disability and Double Indemnity clauses of the kind described" in the complaint. Defendant's agent testified, "there is only one ordinary life policy that we issue. In the ordinary life, when a man applies for it, he makes application and is entitled, if he can pass the physical examination, to have added to the ordinary life policy sick benefit and double-indemnity features, that is, he applies for it at the time of making application. We call that an ordinary life policy with a double indemnity, ordinary life plan. The policy with these additional features added belongs to the same plan as an ordinary life policy."

The judgment rendered is as follows:

"It is, therefore, ordered, adjudged and decreed, that the defendant, The Equitable Life Assurance Society of the United States, forthwith

issue and deliver to the said Ralph Rosenberg in exchange for policies numbered 2488879, 2488880 and 2488881, heretofore issued by said defendant to said plaintiff, and now held by said plaintiff and deposited with the clerk of this court, a policy of life insurance to be dated as of 15 November, 1925, for the face amount of fifteen thousand dollars ($15,000), on the ordinary life plan, containing a permanent disability clause and a clause providing for the payment of double indemnity in accordance with the terms of such clauses as are usually and ordinarily inserted in policies of like character issued by defendant; said policy to provide for the payment of premiums semiannually, as of 15 November and 15 May of each year at the established premium rate fixed by the said defendant in its regular schedule of premium rates on ordinary life plan policies containing such clauses for persons of the age of thirty-seven years.

And it is further ordered, adjudged and decreed, that the plaintiff pay to the defendant upon delivery to him of said policy of life insurance (and delivery is conditioned upon such payment) the premium to be fixed by the age on the birthday nearest to the date of such exchange according to the rates of the defendant then in force; and the defendant shall apply eighty per cent (80%) of the net value of the three five thousand-dollar policies above mentioned, to wit, policies numbered 2488879, 2488880, 2488881, computed in accordance with the American Experience Table of Mortality with three per cent (3%) interest per annum computed to 15 November, 1925, together with the sums paid by the plaintiff to the defendant for or on account of premiums on said three policies so surrendered in exchange since 15 November, 1925.

And it is further ordered, adjudged and decreed that the defendant pay the costs of this action to be taxed by the clerk."

This judgment is affirmed. We find

No error.

STATE v. R. B. CROWDER.

(Filed 26 January, 1927.)

1. Criminal Law—Motions—Abatement—Pleas—Appeal and Error—Affidavits—Presumptions.

Where the defendants in a criminal action before trial move to quash the indictment in the bill upon affidavits not appearing on appeal to have been denied, and accepted in the Supreme Court by the Attorney-General to be true, the appeal thereon will be determined upon the allegations of the affidavit as a correct statement of the truth as therein alleged.

2. Same—Grand Jury—Solicitors—Courts—Appeal and Error.

The grand jury in passing upon a criminal indictment act independently of the solicitor, and receive such instructions as they may desire from the judge presiding, and when it is made to appear that the solicitor was present in the grand jury room assisting the grand jury by explaining the evidence and the law, the defendant's plea in abatement should be granted upon a sufficient affidavit of the defendant upon motion made before the trial.

APPEAL by defendant from *Cranmer, J.,* at June Term, 1926, of VANCE.

The defendant was convicted on several bills of indictment charging him with the embezzlement of certain funds, the property of the Farmers and Merchants Bank, and from the judgment pronounced he appealed, assigning among others the alleged errors herein set forth.

Before pleading to the charge, the defendant upon affidavits which were not denied, moved to quash the several bills of indictment on two grounds: (1) that the solicitor was in the grand jury room and participated in the finding of the bills; (2) that an interested member of the grand jury participated in finding the bills.

Before pleading the defendant also filed a plea in abatement based upon affidavits which were not denied. In these affidavits it was alleged that the grand jury gave only one hour and a half to the consideration of the eleven bills; that they examined only one witness for the State, and that he had no personal knowledge of the transactions charged against the defendant; that the solicitor was with the grand jury during one hour of this time, "participated in the examination of the witness and explained the testimony to the grand jury and advised and procured their action in finding a true bill"; and that one of the grand jurors was a depositor and creditor of the bank and interested in the settlement of its affairs. The motion to quash and the motion in abatement were denied and the defendant excepted.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

D. P. McDuffie and Thomas M. Pittman for defendant.

ADAMS, J. In the brief of the Attorney-General it is said, "The State itself filed no affidavits contesting the allegations of fact in the defendant's affidavits," and in the defendant's brief it is affirmed: "There was no denial of the allegations of the affidavits or the plea in abatement; the fact was not questioned and the motion was argued on both sides upon the assumption that the same was true."

It is not our province to speculate as to the result had counter affidavits been filed and had the facts been found, for as the argument here

assumed the truth of the affidavits, we must consider the defendant's motions upon the theory that the allegations are admitted facts; and these allegations raise the decisive question whether advising and procuring the action of the grand jury in returning a true bill is sufficient to sustain a plea in abatement.

Into the origin, history and development of the grand jury we need not inquire. Whether it was anciently a body not only of accusers, but of triers, is immaterial; in this country it is regarded as an informing and judicial tribunal, exercising functions which are original, complete and susceptible of being exercised upon its own motion and upon such knowledge as it may derive from any proper source. 28 C. J., 763; *U. S. v. Thompson,* 251 U. S., 406, 413; 64 Law Ed., 333, 342.

The relation existing between a public prosecuting officer and the grand jury to whom he transmits his bills of indictment is not to be determined by any rule of universal application. The rules differ in various jurisdictions. Indeed, there is difference of opinion as to the practice at common law, one saying that the practice authorized the attendance of the prosecuting officer upon the sittings of the grand jury; another that he had no right to attend the sessions at all; a third that at common law the grand jurors conducted the examination of witnesses themselves, not permitting the attorney for the crown to enter the room. 28 C. J., 802; *U. S. v. Wells,* 163 Fed., 313, 324; The Grand Jury, Edwards, 127. In some States the prosecuting officer may be present except when the grand jurors are deliberating or voting; in others it is held to be improper for him to appear before them when they are in session; and still in others that it is proper for him to be present and to give such general instructions as may be required.

Which of these rules, if either, has been adopted in North Carolina? On this point our decisions, while relatively few, are very pronounced. Preliminary reference may be made to a statement written by *Chief Justice Pearson:* "The province of a grand jury is, not to try the party, but to inquire whether he ought to be put on trial; and the purpose is, to save the citizen the trouble, expense, and the disgrace of being arraigned and tried in public on a criminal charge unless there be sufficient cause for it." *S. v. Branch,* 68 N. C., 186. The method of ascertaining whether the party should be put on trial was pointed out by *Bynum, J.,* in *Lewis v. Comrs.,* 74 N. C., 194: "Private individuals who may desire to prosecute offenders have the right to inform the solicitor and have him to frame a bill of indictment against the accused, endorsing upon it the name of the prosecutor, as such, with such other witnesses as he may desire, and send the bill with the witnesses to the grand jury." As to the prosecuting officer he observed in the same opinion: "A solicitor is not a judicial officer. He cannot administer an

oath. He cannot declare the law. He cannot instruct the grand jury in the law. That function belongs to the judge alone. If the grand jury desire to be informed of the law or other of their duties, they must go into court and ask instructions from the bench. So the solicitor has no business in the grand jury room. He is not a component part of that body. It is true, the grand jury is a component part of the court, but it is an independent and self-acting body, clothed with the very highest functions and, as such, is responsible to the law and to society. None but witnesses have any business before them. No one can counsel them but the court. They do not communicate with the solicitor, but with the court, either directly or through an officer sworn for that purpose. They act upon their own knowledge or observation in making presentments. They act upon bills sent from the court with the witnesses. The examination of the witnesses is conducted by them without the advice or interference of others. Their findings must be their own, uninfluenced by the promptings or suggestions of others or the opportunity thereof. We know there have been wide departures from the principles here announced, in this and perhaps in other judicial districts. It has become necessary, therefore, to review the ground, and recur to the earlier and more correct practice as it was established by those who have gone before us, and has been handed down by tradition and the recollection of the oldest members of the court."

The case is cited with approval as to this point in a learned and trenchant concurring opinion written by *Justice H. G. Connor* in *S. v. Lewis,* 142 N. C., 636.

It will be noted, then, that our decisions are to be classed among those which discountenance the custom of permitting the prosecuting attorney to attend the sessions of the grand jury. His right to be present while the grand jurors are deliberating or voting is denied by courts that approve the custom; and it is held with practical unanimity that it is improper for him to attempt to influence the grand jury's action or decision. True, in some jurisdictions it has been held that his presence in the grand jury room and his active participation in the examination of witnesses is at most an irregularity; but in opinions written by justices distinguished alike for their learning in the law and for their fidelity to the preservation of established principles this Court has emphatically disapproved the position. Nevertheless, we should be loath to hold that the mere presence of the solicitor in the grand jury room constitutes sufficient cause for abatement in the absence of some evidence of conduct or speech apparently prejudicial to the accused, or to suffer a bare unsubstantial technicality to defeat the administration of justice. But what shall be said of the allegation, not only that the solicitor was present with the grand jury one hour and participated in the examina-

tion of witnesses, but that he "explained the testimony to the grand jury and *advised* and *procured* their action in finding a true bill?" Here is a distinct averment that the defendant was prejudiced. In *Com. v. Bradney,* 126 Pa., 199, it is said in substance that the grand jury alone must consider and apply the evidence, and that the prosecuting officer must not attempt either to influence their action or to give effect to the evidence adduced. This, we think, is the uniform rule everywhere applied. Taking the affidavits to be true, as counsel have treated them in the briefs, and applying principles which have met with approval in practically all jurisdictions, we can reach only one conclusion, that is, that the plea in abatement should have been sustained. To hold otherwise would be, not only to disregard the former decisions and the recognized policy of this Court, but to lay down a principle which has received almost universal disapproval.

We may be assured that the diligent and capable officer who prosecuted these actions had in mind only a commendable purpose to render needed service in the performance of an official duty, and that what he did was an inadvertent "departure from the principles here announced"; but it is far better that new bills be drafted than that these principles be rejected or disregarded.

Error.

JOHN A. GOODE v. CITY OF ASHEVILLE.

(Filed 26 January, 1927.)

1. Municipal Corporations—Cities and Towns—Streets and Sidewalks—Damage to Property Owners—Special Benefits—Offsets—Judgments—Appeal and Error.

When the statute so provides, the owner of lands upon a street widened by a city may have his damages by reason thereof offset by the special benefits he will receive to the extent of such damages only, and where the verdict finds that the value of the special benefits exceeded the owner's damages, it is error to render judgment against the owner for the excess.

2. Same—Statutes—Constitutional Law.

A statute or legislative charter is valid that provides that a city in widening its streets may have the damages sustained by the owner of lands abutting thereon diminished by the special benefits he may receive from the improvements so made, to be assessed by subagencies of the city, etc., with right of appeal to the courts.

CIVIL ACTION, before *McElroy, J.,* of BUNCOMBE.

This was a proceeding originally instituted by the city of Asheville against property owners on North Lexington Avenue to condemn prop-

erty for the purpose of widening the street. It is admitted that ten feet was cut off from the lots of plaintiff on said street, and that the plaintiff had a two-story brick building on the premises at the time of the condemnation proceeding, and that a part of his building was cut off.

It is further agreed that the only matters involved in this action are the amount of damages and reasonable cost of property taken for the widening of Lexington Avenue, and the amount of benefits accruing to the property of the plaintiff by virtue of the widening of said street.

The plaintiff appealed from the award to the Superior Court, and the following issues were submitted to the jury:

1. What damages, if any, has the plaintiff sustained by reason of the taking of his property on Lexington Avenue?

2. What benefits, if any, will the plaintiff receive by reason of widening of Lexington Avenue?

The jury answered the first issue, $9,900, and the second issue, $11,520.

Thereupon, as the special benefits exceeded the value of the property taken, the trial judge rendered the following judgment:

It is therefore ordered and adjudged that the sum of $1,650 be assessed against the land of the plaintiff described on the map or plan of this proceeding as lots 213, 214, 215 and 216, as provided by the charter of the city of Asheville, and that the defendant pay the costs of this action, to be taxed by the clerk.

Zeb F. Curtis for John A. Goode.
Jones, Williams & Jones for City of Asheville.

BROGDEN, J. The question is this: In condemnation proceedings for taking property, can special benefits to the particular piece of property be assessed in excess of the amount of damages awarded the landowner?

This record discloses that it was admitted that the proceeding was properly instituted and conducted.

The city of Asheville has power, under its charter, to create assessment districts and to condemn property for widening streets and for making other public improvements. A jury for condemnation is provided for and notice to the property owner.

Section 291 of the charter provides that the jury shall view the land "and shall assess the damages, if any, to every one of the premises which they have viewed, and the special benefit, advantage or enhanced value, if any, which will accrue by reason of said improvement."

Section 296 provides that the governing authorities of the city may decrease or increase assessments. And it is further provided therein:

"and the lands condemned in said proceedings shall vest in said city so long as they may be used respectively for the purpose of said improvement, so soon as the amount of damages assessed to them respectively, decreased by the amount of special benefit, advantage and enhanced value, so assessed against them respectively, shall have been paid or tendered to the owner or owners of such premises respectively, or deposited as hereinafter provided."

Section 298 provides for an appeal, and further provides as follows: "But it shall be lawful for it to enter upon and use the property so condemned as and for such purpose at any time after the expiration of two days from the date when the amount of damages assessed by the jury decreased by special benefits, advantage and enhanced value, as aforesaid, shall have been paid."

Section 301 provides that special benefits assessed against property, unless paid or set off by damages assessed thereon, shall become and be a lien in favor of said city on said premises.

In a condemnation proceeding the question to be determined is, what damages shall landowner receive as a result of the taking of his property?

The measure of damages in such cases "is the difference in value before and after taking, less the special benefits, and that increased value to the land enjoyed in common with others affected by the improvement is not a special benefit." *Lanier v. Greenville,* 174 N. C., 311; *Campbell v. Comrs.,* 173 N. C., 500; *Elks v. Comrs.,* 179 N. C., 241; *Bost v. Cabarrus,* 152 N. C., 531; *R. R. v. Platt Land,* 133 N. C., 266.

The Legislature has power to provide by statute that the damages accruing to the landowner can be reduced not only by special benefits received by the landowner, but by all benefits accruing to him "either special or in common with others." *Miller v. Asheville,* 112 N. C., 768; *Lanier v. Greenville,* 174 N. C., 311.

In *Stamey v. Burnsville,* 189 N. C., 39, the rule was thus declared: "It seems to be the general rule in this jurisdiction that the compensation which ought justly to be made, just compensation, under our general statute is such compensation after special benefits peculiar to the land are set off against damages."

In *R. R. v. Platt Land,* 133 N. C., 266, the Court held that only special benefits can be deducted from the compensation or damage.

The sections of the charter of Asheville contained in the record declare that the city shall be the owner of the property "so soon as the amount of damages . . . decreased by the amount of special benefit . . . shall have been paid. And further, that special benefits become a lien only, unless paid or set off by damages assessed."

It would therefore seem to be clear from the authorities that in a condemnation proceeding special benefits are to be considered as an offset, deduction or counterclaim against damages accruing to the property owner in order to determine what sum, if any, the property owner shall receive for the land so taken. And further, that the law does not contemplate that a city can take the property of a landowner for public purposes, pay nothing for the land taken, and at the same time recover a judgment against the owner for the privilege of having his land taken without compensation. In other words, special benefits are allowed by the law as an offset or deduction from the amount of damages to be paid, for taking the property, and to the extent only of determining the amount the landowner shall receive for his property. A perusal of the provisions of the charter of Asheville, contained in this record, discloses that the amount of damages assessed are to be decreased by the amount of special benefit, advantage and enhanced value. Hence, in the charter, special benefits are ascertained for the purpose of decreasing the damage or as an offset to damage awarded a property owner.

It does not seem to have been expressly decided in this State as to whether, in the event the special benefits exceed the damages, that a judgment for the excess benefits can be awarded against the property owner.

In *Wade v. Highway Commission,* 188 N. C., 210, the trial judge charged the jury as follows: "You have heard the evidence and it is for you to say whether or not the damage to the land has been greater than the special benefit accruing to it, and if you so find whatever amount you find will be your answer to this issue. But if you find the special benefit is greater than the damage you would answer the issue 'nothing.' "

This charge of the trial judge expressly held that if the special benefit exceeded the damage, the plaintiff should recover nothing, and there was no intimation that the defendant could recover the excess of special benefits over the damages sustained in taking plaintiff's property. This Court, in considering this charge, found it erroneous, but upon the sole ground that general as well as special benefits were to be permitted and allowed as offset to damages awarded the owner.

We are therefore of the opinion, and so hold, that the plaintiff, Goode, is not liable for $1,650, special benefits awarded, and with this modification the judgment is affirmed.

Modified and affirmed.

WASH STEWART v. BLACKWOOD LUMBER COMPANY AND LEONARD McCOY.

(Filed 26 January, 1927.)

Railroads—Tramroads—Negligence—Contributory Negligence—Damages—Statutes—Master and Servant—Employer and Employee—Fellow-Servant Act.

A small narrow-gauge road running through the woods and used for the purpose only of transporting logs to the defendant's lumber plant or sawmill, with the cars loaded with logs pulled up a grade by means of a steam skidder, the wire cables, operating around a drum upon the skidder, is a tram or logging road within the intent and meaning of C. S., 3470, amending C. S., 3467, and an employee negligently injured by such company is not barred of his right to recover damages when caused by a fellow-servant; and contributory negligence is only considered in determination of the amount of damages the injured employee has sustained.

APPEAL from *Harding, J.*, and a jury, at July-August Term, 1926, of SWAIN. No error.

This was an action for actionable negligence, brought by plaintiff against defendants. The defendant lumber company, in its answer, pleaded contributory negligence, assumption of risk and the negligence of plaintiff's fellow-servant.

The plaintiff's evidence, in substance: The plaintiff was employed by defendant lumber company loading logs. The evidence was to the effect that the main plant of the lumber company is at East LaPorte. The logs were gotten about fourteen miles back in the woods and transported to the main plant or sawmill over the main line and spur-track of defendant lumber company. The main line of the lumber company runs back from the main plant to the woods and in about one-half mile of where the lumber was taken out of the woods. It had a railway line, narrow-gauge road, leading up a steep grade back to the woods where the lumber was being taken out. A small rail track from the main line goes back up in the woods, up a branch, and it is so steep a train cannot run on it, and the cars have to be pulled up said incline spur-track by means of a steam skidder and wire cable, which was spooled or wound around the drum of said skidder as the cars were pulled up the track. The main logging road from the mill ran to a point about one-half mile from where plaintiff was injured. From the end of the railroad an incline extended up to the point where the logs were loaded by the skidder machine. This car, after being loaded with logs by the loading machine, was let down off the incline to a point at the end of the standard gauge railroad. The logs were then picked up by another loading machine and loaded upon the railroad car and were thence

hauled by locomotive to the mill. The plaintiff's duties were to work at the upper end of the incline with the loading crew; that on the day prior to plaintiff's injury, the defendants had pulled certain log cars up said incline by means of said steam skidder and wire cable and had loaded same with logs near the place where plaintiff was injured, the plaintiff hooking tongs for the loaderman and assisting to load said cars; that after said logs were loaded the defendants moved said steam skidder and loader machine a distance of about one hundred (100) feet back up said incline spur-track, and after said steam skidder was moved it was necessary to lengthen the cable extending from the loader to the main line or landing for the reason that all the cable around the drum, which was attached to the loader, had been used, and it was necessary to place more cable on this drum in order to let the aforesaid cars of logs down the main line or landing; that said cars of logs were left standing on said track until the following day, the date of plaintiff's injury. At the time plaintiff was injured, he was a member of a crew of men engaged in transporting and moving said log cars down and over said incline railroad, in that, he was helping to move a log to be placed under a spool so that said spool could be turned thereby taking the wire cable off said spool and placing the same around the drum attached to the loader; that plaintiff was ordered by the foreman of the defendant company to hook tongs into said log, and as soon as plaintiff hooked said tongs the defendant, Leonard McCoy, negligently and carelessly jerked said log with said steam skidder without being signalled so to do, and before giving plaintiff time to get out of the way and to a place of safety, thereby seriously and permanently injuring the plaintiff.

The defendant lumber company tendered issues based on its answer: (1) Contributory negligence; (2) assumption of risk; (3) negligence of a fellow-servant. The court below refused the issues as tendered by the lumber company, but submitted the usual issues of negligence, contributory negligence and damages. The jury answered the issue of negligence "Yes," contributory negligence "No," and damages "$7,500."

There was a judgment on the verdict and appeal taken to the Supreme Court and numerous errors assigned.

Moody & Moody and McKinley Edwards for plaintiff.

Felix E. Alley and S. W. Black for defendant, Blackwood Lumber Company.

CLARKSON, J. The lumber company contends that the plaintiff was not engaged in railroad service, and the incline at which plaintiff was working was not a railroad in contemplation of the statute.

C. S., 3467 (Public Laws 1913, ch. 6, sec. 2), is as follows: "In all actions hereafter brought against any common carrier by railroad dam-

ages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided, however,* that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

C. S., 3470 (Public Laws 1919, ch. 275) is as follows: "The provisions in this article relating to liability for damages shall also apply to logging and tramroads."

The court below charged the jury as follows on this aspect of the case: "The court charges you that if you believe the evidence the incline or railroad on which the incline machine or loader was operated was a railroad or logging road within the meaning of the law governing actions brought by railroad employees against railroads for personal injuries, or actions of this nature." We think the charge correct.

The spur-track or incline, in discussion, consisted of a narrow-gauge track of steel rails laid on cross-ties and extended from the main line of the road about one-half mile up into the woods to get out logs. The cars on this narrow gauge were pulled up said incline or steep grade road by means of steam skidder and wire cable, which was spooled or wound around the drum of the skidder as the cars were pulled up the track. On the record it is not disputed that this spur-track or narrow gauge road was used exclusively for hauling logs out of the woods.

In *Williams v. Mfg. Co.,* 175 N. C., p. 226, decided 20 March, 1918, the plaintiff was injured while working on a logging railroad of the defendant. The Court said: "All the evidence shows that the defendant is what is commonly called a logging railroad, which is held to be a private road constructed for the convenience and accommodation of lumbermen. *Thompkins v. Gardner Co.,* 69 Mich., 58. The defendant does not hold itself out to the public as a carrier of anything, either of freight or passengers, but was constructed and is operated solely as an aid to the manufacturing business of the defendant." After the Williams decision, the Legislature, Public Laws 1919, ch. 275 (C. S., 3470), enacted, "The provisions in this article relating to liability for damages shall also apply to *logging roads and tramroads.*"

The clear language of the Act of 1919, ch. 275, *supra,* says that the provisions of this article (Fellow-servant rule abrogated, C. S., 3465)—contributory negligence no bar, but mitigates damages. C. S., 3467, applies to *logging roads.*

In *McKinish v. Lumber Co.,* 191 N. C., p. 836, this Court held: A logging road comes within the provision of our statute making contributory negligence of an employee an element of consideration by the jury in assessing the amount of damages recoverable, and is not a complete bar to the employee's recovery in his action for damages.

In *Sigman v. R. R.,* 135 N. C., at p. 184, it is said: "It is settled that the fellow-servant law, chapter 56, Private Laws 1897, applies to railroad employees injured in the course of their service or employment with such corporation, whether they are running trains or rendering any other service. In *Mott v. R. R.,* 131 N. C., at p. 237, it is said: 'The language of the statute is both comprehensive and explicit. It embraces injuries sustained (in the words of the statute) by "any servant or employee of any railroad company. . . . *in the course of his service or employment with said company.*" The plaintiff was an employee and was injured in the course of his service or employment,'" citing numerous authorities.

The above decision was written before the provision of the statute was made applicable to logging roads and tramroads, but since the Act of 1919, ch. 275, C. S., 3470, same applies with equal force to logging roads and tramroads.

The entire evidence shows that the plaintiff was injured "in the course of his services or employment with such company," etc. C. S., 3465.

We have gone through the record and read the charge with care, and can find

No error.

CHARLOTTE BANK AND TRUST COMPANY v. C. W. SMITH, H. L. WILSON, B. J. BLUME AND J. E. TOOLE.

(Filed 26 January, 1927.)

1. Bills and Notes—Negotiable Instruments—Banks and Banking—Renewal Notes—Duress—Fraud—Evidence.

Evidence that a bank agreed to give an extension of time by a renewal note it held against the plaintiff upon the condition that he would endorse another note it held from a different maker, and threatened to immediately sue upon the past due note of the defendant, is only of a lawful act on the part of the bank, and is not sufficient of duress or fraud in the procurement of the defendant's endorsement of the note to the other payee to avoid the defendant's liability thereon as an endorser.

2. Same—Consideration.

Where the bank has the right to sue its payee upon a past due paper, its parol agreement to extend the time of payment by a renewal note is without consideration and unenforceable.

BANK *v.* SMITH.

APPEAL by plaintiff from *Harding, J.,* at February Term, 1926, of MECKLENBURG. New trial.

Actions to recover judgment upon two notes, one for $2,000, and one for $2,500, both executed by defendant, C. W. Smith, and payable to the order of plaintiff, were consolidated for trial. Both notes were endorsed by defendants, H. L. Wilson, B. J. Blume and J. E. Toole. Neither was paid at maturity.

The matters alleged in the answer of defendant, H. L. Wilson, and relied upon by him in defense of the action, were submitted to the jury upon the fourth issue, which is as follows:

"4th. Was the endorsement of the said notes by H. L. Wilson, defendant, procured by fraud and undue influence exercised upon him by M. A. Turner, president of the plaintiff bank?"

The jury answered this issue, "Yes." From judgment upon the verdict, that plaintiff recover nothing of the defendant, H. L. Wilson, and that said defendant recover of plaintiff his costs in said actions, plaintiff appealed to the Supreme Court.

Walter Clark and James A. Lockhart for plaintiff.
Andrew Joyner, Jr., and Shuping & Hampton for defendant.

CONNOR, J. The plaintiff in apt time requested the court, in writing, to instruct the jury as follows:

"Upon the whole evidence, if the jury finds the facts to be as testified to by the witnesses, they should answer the fourth issue, 'No.'"

The court refused to give this instruction; plaintiff excepted. On its appeal to this Court plaintiff relies chiefly upon its assignment of error based upon this exception.

The evidence tends to show that on 4 December, 1924, plaintiff bank held two notes executed by defendant, H. L. Wilson, payable to the order of B. J. Blume, each in the sum of $2,500. Both these notes, endorsed by defendants, C. W. Smith and J. E. Toole, had been negotiated by the endorsement of B. J. Blume, payee therein, to plaintiff. Both notes were past due, and defendant, H. L. Wilson, who resides in Guilford County, went to Charlotte for the purpose of procuring an extension of said notes. B. J. Blume went with defendant to the plaintiff bank, and there had an interview with Mr. Turner, its president.

H. L. Wilson testified that an agreement was entered into between Mr. Turner, Mr. Smith and Mr. Blume with respect to these notes. It was agreed that Mr. Blume and Mr. Smith would pay the two notes by 15 December, 1925. Witness then returned to Greensboro. A few days after his return he received several letters and a telegram from Mr. Turner, in consequence of which he returned to Charlotte where he first called on Messrs. Blume, Smith and Toole. He then went with

Mr. Smith to Mr. Turner's home. Witness was there informed by Mr. Turner that the bank authorities would not agree to hold his notes until 15 December. Mr. Turner stated to witness that the bank held a small note of Mr. Smith's. He suggested to witness that some satisfactory arrangement might be made for the extension of defendant's notes. Turner, Wilson and Smith then went to the bank. Defendant testified as follows:

"When we got to the bank Mr. Turner went around to his office and handed me out a $5,000 note already made out. I said to him, 'How about Toole and Blume signing this note?' Mr. Turner said, 'Mr. Wilson if you will sign that note I will guarantee to get Mr. Blume and Mr. Toole to sign it tomorrow.' I said, 'I will sign it provided you will do so.' He repeated that he would.

"After I signed the $5,000 note Mr. Turner got out these two notes of C. W. Smith, one for $2,000, and one for $2,500, and said, 'How about signing these notes?' I replied, 'I can't sign any more notes. I can't take care of any which I have already signed.' He said, 'Unless you sign these notes, I will have to sue you on the other.' There had already been arrangements made to carry the other notes to 15 December. He said, 'Unless you sign these two notes, I cannot renew that $5,000 note.' I said, 'I can't hardly pay that $5,000 note and I can't put my signature on any more notes.' He said, 'Unless you do, I will have to sue you right away.' Through his threats—I was worried by his letters and telegrams—I signed the notes. He threatened me, and I was excited, worried and nearly crazy. I went ahead and signed the two notes. I judge that Mr. Turner talked with me about signing these notes of Smith's about ten or fifteen minutes. To force me to sign the notes sued on in this action, Mr. Turner threatened to sue me on that $5,000 note. That was the threat he made—the only threat. He had promised Mr. Blume and Mr. Smith to wait until 15 December on my note. He would not extend the period of payment on the $5,000 note unless I signed these notes of Smith."

This is all the evidence submitted to the jury upon the fourth issue. The other issues were answered "Yes" by consent. They were as follows:

1. Did the defendant endorse the note dated 21 November, 1924, of $2,000, payable to plaintiff, signed by C. W. Smith and endorsed by B. J. Blume and J. E. Toole as alleged?

2. Did the defendant endorse the note dated 3 December, 1924, of $2,500, payable to plaintiff, signed by C. W. Smith, and endorsed by B. J. Blume and J. E. Toole, as alleged?

3. Are said notes due plaintiff and unpaid?

We fail to find in the testimony of defendant—which was the only evidence offered by him pertinent to the fourth issue—any evidence of

fraud or undue influence. The agreement to extend the time for the payment of the notes executed by defendant, and held by plaintiff as holder in due course, was between plaintiff and the endorsers of the note. There is no evidence of any agreement on the part of the bank with defendant as maker of the notes. Nor was there any consideration for the agreement which defendant testified was made by the bank, and Messrs. Smith and Blume.

Plaintiff therefore, until it accepted the note for $5,000 in renewal or in payment of defendant's two notes for $2,500 each, both of which were then due, had the legal right to bring suit on said notes at once. A threat to do what one has a legal right to do cannot constitute duress. 13 C. J., 399. It is manifest that defendant endorsed the notes of C. W. Smith—his brother-in-law—in order to procure an extension of time for the payment of his own notes. There is no evidence in this record sustaining the affirmative of the issue submitted to the jury.

There was error in refusing to give the instruction as requested by plaintiff. There must be a

New trial.

ERNEST L. BARTON, PLAINTIFF, v. FRANK D. GRIST, COMMISSIONER OF LABOR AND PRINTING.

(Filed 26 January, 1927.)

1. Constitutional Law—Statutes—Employment Agencies—Initial Fees—Injunction.

The question of the constitutionality of a statute prohibiting employment agencies to charge an initial fee for its services, does not arise upon the citation by the Commissioner of Labor and Printing to the agency to appear and show cause in court why the agency's license should not be revoked for the violation of the statute in this respect, it presently not appearing whether the agency had charged such fee or the adverse action of the commissioner upon the question involved.

2. Same—Courts—Advisory Opinions.

The courts will not anticipate questions of constiutional law in advance of the necessity of deciding them, or give advisory opinions thereon.

CIVIL ACTION, before *Stack, J.*, at September Term, 1926, of MECKLENBURG.

This was an action instituted by the plaintiff for an injunction restraining the defendant, Commissioner of Labor and Printing, from requiring the plaintiff to appear and show cause why the license issued by the Department of Labor and Printing to the plaintiff should not be revoked.

The plaintiff is engaged in conducting and operating an employment agency under the name of Queen City Employment Agency in the city of Charlotte, and a license has been duly issued to the plaintiff to operate such employment agency in accordance with the provision of chapter 127, Public Laws 1925.

On 3 September, 1926, the defendant issued to the plaintiff the following notice: "Upon evidence on file in this department, it appears that the Queen City Employment Agency, Room 16-17, Brown Building, Charlotte, N. C., has not been operating according to statute passed by the General Assembly, 1925, entitled An Act to Regulate Private Employment Agencies, being chapter 127, Private Laws of 1925.

The evidence shows that the Queen City Employment Agency has violated subsection 1, section 1, of the aforesaid act by charging initial fee for services. Therefore you are hereby notified to appear at a hearing before the Commissioner of Labor and Printing of the State of North Carolina at 2 o'clock p.m., Tuesday, 21 September, 1926, at Mecklenburg County courthouse, in the city of Charlotte, N. C., to show cause why the license issued by the Department of Labor and Printing to the Queen City Employment Agency should not be revoked."

Thereupon, the plaintiff instituted an action against the defendant for the purpose of restraining and enjoining said defendant from revoking the license issued to the plaintiff "upon the ground that the plaintiff charges an initial fee for services or has charged fees for services not as specified in said act."

The court rendered the following judgment, from which judgment the plaintiff appealed:

"This cause coming on to be heard before his Honor, A. M. Stack, judge presiding, on motion to show cause why the temporary injunction heretofore issued in this cause should not be made permanent, after hearing same, the court being of the opinion that the plaintiff has no right to charge an initial fee of $1.00, therefore dissolves the temporary injunction, but the restraining order will continue in effect until the case can be heard in the Supreme Court upon the express understanding and agreement on the part of the plaintiff that he will not charge the $1.00 fee until the question can be decided by the Supreme Court."

Walter Clark for plaintiff.

Attorney-General Brummitt and Assistant Attorneys-General Nash and Allen for defendant.

BROGDEN, J. This action is brought to restrain the defendant from instituting a hearing to determine whether or not the plaintiff has violated subsection 1, section 1, chapter 127, Public Laws 1925, which pro-

vides "that the employment agency shall not charge any initial fee for its services." It is not alleged in the complaint that the plaintiff has charged an initial fee for its service or the amount thereof. The notice served upon plaintiff by the defendant intimates that the defendant has violated subsection 1, section 1, of said act of the General Assembly by charging an initial fee for services. The judgment of the court declares "the court being of the opinion that the plaintiff had no right to charge an initial fee of one dollar, therefore dissolves the temporary injunction." But there is no allegation in the pleadings nor any evidence in the record that the plaintiff has charged an initial fee or has otherwise undertaken to violate subsection 1, section 1, of said act. In its final analysis, as disclosed by this record, the basis of plaintiff's action is the restraining of defendant from holding a hearing upon the question as to whether or not the plaintiff has violated the law. The relief asked is that the court shall declare the act unconstitutional upon the ground that the Legislature is without constitutional power to regulate compensation that an individual shall receive for certain personal services, and that the Legislature is further without constitutional power to specify the maximum amount that an individual may contract for in rendering personal services.

The notice of the hearing limits the hearing to the determination as to whether or not subsection 1, section 1, of said act has been violated. In the absence of any allegation or proof that any initial fee is being charged by the plaintiff, or, if so, whether the amount is reasonable, the constitutional questions invoked are not properly raised upon the record. For the Court to declare invalid an unenforced statute would be equivalent to passing upon a "mere abstraction." *Wardens v. Washington,* 109 N. C., 21; *Scott v. Smith,* 121 N. C., 94; *Paul v. Washington,* 134 N. C., 363; *Hargett v. Bell,* 134 N. C., 395; *S. v. R. R.,* 145 N. C., 521; *Crawford v. Marion,* 154 N. C., 73.

The Court cannot assume that the defendant will revoke the license of the plaintiff, certainly in the absence of any allegation or proof to the effect that plaintiff has violated the statute by charging an initial fee. In this State the rule has been universally adhered to, that the courts never anticipate questions of constitutional law in advance of the necessity of deciding them, "nor do they venture advisory opinions on constitutional questions." *Moore v. Bell,* 191 N. C., 305; *Person v. Doughton,* 186 N. C., 725; *S. v. Corpening,* 191 N. C., 751; *Wood v. Braswell,* 192 N. C., 588.

While the judgment of the court declares "plaintiff has no right to charge an initial fee of one dollar," there is no allegation or proof to support such declaration of the judgment. The judgment is

Affirmed.

LUCY McINTURFF ET AL. v. WADE GAHAGAN ET AL.

(Filed 26 January, 1927.)

1. Judgment—Estoppel—Parties—Subject-Matter—Issues.

Estoppel by judgment rests upon the identity of parties, subject-matters and issues between the judgment relied upon and the relief sought in the present action.

2. Same—Wills.

Where the deceased nonresident payee of a note refers thereto in his will with the provision that the maker "hold what he owes until both of our deaths and pay the interest to my wife . . . to support her as long as she lives": *Held*, a judgment in the court of foreign jurisdiction wherein the beneficiaries under the will were not made parties, that the maker keep the note, properly secured, lacks the essential elements of an estoppel in this Court for want of necessary parties, and from the judgment relied on it was impossible on this appeal to sufficiently determine the subject-matter.

3. Bills and Notes—Negotiable Instruments—Extension of Time—Contracts—Consideration.

The time of payment of a negotiable instrument may be extended by a proper agreement between the parties upon a valuable consideration for a definite period of time.

CIVIL ACTION before *McElroy, J.*, at March Term, 1926, of MADISON.

The plaintiff, Lucy McInturff, is the duly appointed receiver of the personal property of S. S. Shelton, deceased, and her coplaintiff, Mary Hampton, is executrix of the will of S. S. Shelton.

On 13 November, 1916, and on 14 November, 1916, William C. Cook and Wade Gahagan executed and delivered to S. S. Shelton promissory notes for $1,000 and for $850.00. The form of the notes are alike and each note is in words and figures as follows: "Without grace, on 14 November, 1917, for value received, we, or either of us, promise to pay to the order of S. S. Shelton, one thousand dollars.

"Negotiable and payable at the Bank of French Broad, Marshall, N. C., with interest at 6 per cent per annum, after maturity, until paid. The drawers and endorsers severally waive presentment for payment, and notice of protest, and nonpayment of this note, and all defenses on the ground of extension of the time of its payment that may be given by the holder or holders to them or either of them."

In 1922, after maturity of said notes, S. S. Shelton, the payee therein, died, domiciled in the State of Tennessee. The will of S. S. Shelton was offered in evidence at the trial and contains this clause pertinent to the controversy: "W. C. Cook to hold what he owes until both of our deaths and pay the interest to my wife, Mrs. S. S. Shelton, to support her as

long as she lives." At her death, the defendant, Cook, was directed to pay out the money to the parties named in the will.

The plaintiffs duly filed certified copy of their appointment as receiver and executrix of the will of S. S. Shelton in the Superior Court of Madison County, and an order was duly made approving the bond of the receiver and permitting her to institute an action against the defendant on said notes. These notes, at the time of the death of S. S. Shelton, were in the hands of his wife, Margaret Bell Shelton, who sent them for collection to the Bank of French Broad, Marshall, N. C., the place of payment named in the notes. The notes were returned by the bank with the information that the executors of the Gahagan estate had refused to pay them.

The trial judge found that the estate of Gahagan was solvent and intimated to the plaintiffs that they were not entitled to recover. Whereupon, they excepted and appealed.

John A. Hendricks for plaintiffs.

G. V. Roberts, C. B. Mashburn and James E. Rector for defendants.

BROGDEN, J. The will of S. S. Shelton was construed by the Chancery Court of Greenville, Tennessee, in an action entitled, Mary Hampton, Executrix, v. Margaret Bell Shelton et al. The judgment in that decree provided: "But in case of the W. C. Cook note, he will be allowed the preference to keep the amount, on condition he keeps it properly secured." It is contended that this is *res adjudicata.* It does not appear from the record that either the defendant, Cook, or the defendant, Gahagan, or his executors were parties to that suit. No document appears in the record except the judgment and it is impossible to determine what the subject-matter of the suit was.

Estoppel by judgment arises upon the following essentials:

1. Identity of parties; 2, identity of subject-matter; 3, identity of issues. *Hardison v. Everett,* 192 N. C., 371.

No such identity sufficient to constitute estoppel by judgment appears upon this record.

The controlling question presented to the trial court and upon this appeal, is whether or not the clause in S. S. Shelton's will, referring to the Cook note, legally extends or postpones the time of payment or collection of said notes until the death of the testator's wife.

The notes were promissory notes, dated on 13 and 14 of November, 1916, and due on 14 November, 1917. The language relied upon as constituting the agreement to extend the time of payment is the following words of the will of S. S. Shelton, the payee, to wit: "W. C. Cook to hold what he owes until both of our deaths and pay the interest to my wife, Mrs. S. S. Shelton, to support her as long as she lives."

The time of payment of promissory negotiable notes may be extended by a proper agreement upon a valuable consideration for a definite period of time. An analysis of this record will disclose, in the first place, that there has been no agreement to extend the time of payment of these notes. The will of S. S. Shelton did not take effect until his death. There is no evidence of any agreement between the defendants, and the payee, Shelton, prior to his death, and a posthumous or ex parte declaration in a will, which does not take effect until after the death of the testator, could not be deemed an agreement between the parties. Neither can the language of the will be construed as a gift of the notes to the defendant, W. C. Cook, for the reason that the parties who are to receive the proceeds of the notes are named and designated in the will.

Indeed, if the language of the will could be construed as an agreement to extend the time of payment, it would be unenforceable by virtue of the fact that it was without consideration. There is no element of benefit to the promisor or detriment to the promisee which would support the agreement. *Scott v. Fisher,* 110 N. C., 311; *Piner v. Brittain,* 165 N. C., 401; *Institute v. Mebane,* 165 N. C., 648; *Roberson v. Spain,* 173 N. C., 23; *Exum v. Lynch,* 188 N. C., 392.

Therefore, there being no valid and enforceable agreement to extend the time of payment of these negotiable instruments, the judgment is

Reversed.

MRS. ANNIE L. QUEEN, ADMINISTRATRIX, v. SUNCREST LUMBER COMPANY ET AL.

(Filed 26 January, 1927.)

Removal of Causes—State Court—Jurisdiction—Federal Court—Complaint—Allegations—Joint Tort.

In an action of an employee against its nonresident employer, operating a lumber road by steam, allegations of the complaint that the death of her intestate was proximately caused by the defendant, and also by the negligence of its resident trainmaster, engineer and conductor by loading the defendant's train, on which the intestate was riding, in the course of his employment, too heavily, and that certain of the train's appliances and attachments necessary to its safe operation, were out of order, sufficiently alleges a joint tort, to deny the nonresident defendant's motion to remove the cause from the State to the Federal court for the fraudulent joinder of resident defendants, and to retain the cause in the State court.

The plaintiff alleges in her complaint that she is the duly appointed and qualified administratrix of T. L. Queen, and that the defendant,

Suncrest Lumber Company, is a foreign corporation, owning large boundaries of timber lands in Haywood County, and in order to cut, manufacture and market said timber it used and operated certain lines of railroad together with locomotives propelled by steam for the purpose of hauling logs, acids and pulp woods from the forest to its manufacturing plant.

The defendant, Salem Collins, was a resident of Haywood County at the time of the death of plaintiff's intestate and was the engineer in charge of the engine owned and operated by the Suncrest Lumber Co. The defendant, Ed Styles, is a resident of Haywood County, and at the time of the death of plaintiff's intestate, was trainmaster for the Suncrest Lumber Co., and in charge of the trains running from the lumber plant and engaged in hauling logs to the plant of the Suncrest Lumber Co. The defendant, Walter Sherrill, is a resident of Swain County and was conductor for the defendant, Suncrest Lumber Co., upon the logging train owned and operated by said nonresident corporation.

The plaintiff further alleged: "That on or about 20 January, 1923, the defendant, Suncrest Lumber Co., made and entered into a contract with the Champion Fibre Co., by the terms of which the Champion Fibre Co. was to cut and remove timber on the lands of the Suncrest Lumber Co., and that the said Suncrest Lumber Co. was to haul provisions for the Champion Fibre Co., and its contractors, free of cost, from Sunburst to the operations of Champion Fibre Co., or its contractors engaged in the cutting and manufacturing of said wood, and that the interpretation placed on said contract was that all contractors, employees of contractors, and all others engaged in the manufacture of wood from the lands covered by said contract and owned by the Suncrest Lumber Co., should be transported free of charge over and across said line of railroad extending from Sunburst to the wood operations contracted to the Champion Fibre Co., as hereinbefore stated."

The plaintiff further alleged that after said contract was entered into between the Suncrest Lumber Co. and the Champion Fibre Co., that the Champion Fibre Co. entered into a contract with T. L. Queen, plaintiff's intestate, by the terms of which said Queen was to cut and manufacture the timber on the lands owned by the Suncrest Lumber Co.

The plaintiff further alleged: That on 21 September, 1925, the plaintiff's intestate, "together with some employees, at the invitation and request of defendants and in pursuance to both an expressed and implied contract then existing between the plaintiff's intestate and the defendant company, loaded a quarter of a beef on a car then owned by the defendant company, and thereupon plaintiff's intestate and certain employees and approximately forty-five employees of the defendant company got on the train, consisting of an engine and one car, at the

defendant's station at Sunburst for the purpose of being transferred to their work some twelve miles up in the mountains."

Plaintiff further alleged: "That said engine and train was negligently operated by the trainmaster, engineer and conductor, loaded too heavily, and that certain appliances and attachments necessary to the safe operation of the train were out of order or repair, and that, as a result thereof, the train was wrecked and plaintiff's intestate killed."

Whereupon, plaintiff demanded judgment for $75,000.00 damages.

The defendant in apt time duly filed a petition for removal to the Federal Court upon the ground of fraudulent joinder of the engineer, trainmaster and conductor of said train, who were all residents of North Carolina. The petition for removal admits that the defendant, Salem Collins, was the engineer of the local train at the time of derailment, and that the defendant, Ed Styles, was trainmaster of said train, and that the defendant, Walter Sherrill, was conductor of said train.

The trial judge denied the motion to remove the cause and retained it for trial in the State court, from which judgment the defendant, Suncrest Lumber Co., appealed.

Morgan & Ward for plaintiff.
Thomas S. Rollins for defendant.

PER CURIAM. The allegations of the complaint are set out at length and allege a joint tort, and therefore the plaintiff could have brought her action against the nonresident defendants or against the resident defendants separately, because the resident defendants were in control of the train and actively engaged in the operation thereof.

This case is governed by the case of *Hough v. R. R.*, 144 N. C., 692, and the decisive principles are fully discussed and determined in the case of *Crisp v. Fibre Co., ante,* 77. The judgment is

Affirmed.

CHARLOTTE BANK AND TRUST COMPANY v. H. L. WILSON.

(Filed 26 January, 1927.)

Bills and Notes—Negotiable Instruments—Renewal—Payment—Fraud—Verdict—Endorsement—Due Course.

Two notes given by the maker with endorsements thereon were acquired for value and before maturity by plaintiff bank, which accepted the note in suit in their places in a sum to cover the entire amount. The defense interposed was that plaintiff bank with notice of the fraud practiced in the original note conspired to release the parties thereon bound

by taking the note in suit directly to itself with threats to bring suit upon the original two notes which the defendant could not withstand. Upon the verdict establishing that there was no fraud practiced in the procurement of the original two notes: *Held*, the plaintiff bank was a holder in due course and could maintain its action whether the note it had obtained was given either in renewal or in payment of the notes it replaced.

APPEAL by defendant from *Harding, J.*, at February Term, 1926, of MECKLENBURG. No error.

Action to recover judgment upon note for $5,000, executed by defendant, and payable to plaintiff or order. The said note was executed by defendant in renewal or in payment of two notes, each for $2,500, theretofore executed by defendant and payable to the order of B. J. Blume. Both of said notes were endorsed by C. W. Smith and J. E. Toole, and thereafter negotiated by the endorsement of B. J. Blume, the payee, to plaintiff, before maturity and for value. The note sued on was not paid at maturity.

In defense of plaintiff's action upon the note for $5,000, defendant alleges that the execution by him of each of the notes for $2,500, was procured by false and fraudulent representations, made to him by B. J. Blume, C. W. Smith and J. E. Toole; that after said notes had been negotiated to plaintiff by the endorsement of B. J. Blume, payee in each, plaintiff, with knowledge of the fraud practiced upon him by B. J. Blume, C. W. Smith and J. E. Toole, conspired with them to procure the execution by defendant of the note for $5,000, payable directly to plaintiff, in renewal of said two notes, for the purpose of releasing the said B. J. Blume, C. W. Smith and J. E. Toole from liability to it as endorsers on said two notes; and that by means of threats to bring suit against defendant upon said notes, which were then past due and unpaid, and of intimidation which defendant was unable to withstand, plaintiff coerced defendant to execute said note for $5,000.

From judgment upon the verdict, defendant appealed to the Supreme Court.

Walter Clark and J. A. Lockhart for plaintiff.
Andrew Joyner, Jr., and Shuping & Hampton for defendant.

CONNOR, J. The jury having found, as appears from the answer to the third issue, that the execution of the two notes, each in the sum of $2,500, was not procured by fraud and misrepresentation, as alleged in the answer, it is immaterial whether or not the note for $5,000, was executed in renewal or in payment of said two notes. The jury has further found, as appears from the answer to the fourth issue, that de-

fendant had knowledge of all the facts which he now alleges as constituting fraud at the time he executed the note upon which this action is brought. In view of these findings and of the admissions in the answer, plaintiff was, as the jury found, a holder in due course of both notes for $2,500; defendant has failed to show any defense which would have availed him in an action by plaintiff to recover judgment upon these notes. The defenses set up in the answer in this action to recover judgment upon the note for $5,000, whether the same was given in renewal or in payment of said notes, cannot, therefore, avail defendant, unless there was error in the admission or exclusion of evidence, or in the instructions pertinent to the third and fourth issues.

We have carefully considered the exceptions upon which defendant's assignments of error are based. They cannot be sustained. We do not deem it necessary to set out these exceptions in detail or to discuss them. The execution of the note sued on by defendant is admitted; he has failed to sustain the allegations of the answer, upon which he relies for defense to plaintiff's recovery. The judgment must be affirmed. There is

No error.

C. S. O'NEAL ET AL. v. T. J. MANN ET AL.

(Filed 26 January, 1927.)

1. Government—Constitutional Law—Drainage Districts — Branches of Government.

The creation of the Mattamuskeet Drainage District by the Legislature and providing for the assessments among the landowners therein according to benefits received under the proceedings in court provided by the statute, is not violative of our Constitution providing that the legislative and judicial, etc., departments of our government shall be separate and distinct from each other. Const. N. C., Art. I, sec. 8; C. S., 5312 *et seq.*, ch. 94, Art. 5, subch. 3.

2. Drainage Districts—Mattamuskeet Drainage District—Courts — Procedure—Statutes.

Under the statutory proceedings for the formation of the Mattamuskeet Drainage District, only the lands therein are to be assessed according to benefits received, and no assessments are to be made against lands not benefited, and a party dissatisfied with the assessments against his lands may appeal, these matters to be determined by the court upon which jurisdiction is conferred by the statute. C. S., 5323, 5329, 5324.

3. Same—Courts—Judgments—Motions in the Cause.

The proceedings prescribed by statute for the formation of the Mattamuskeet Drainage District is judicial and not administrative, the remedy

of such owners who claim their lands have been assessed without benefit being by motion in the cause after the judgment has been entered against them in the proceedings before the clerk.

4. Drainage Districts — Mattamuskeet Drainage District — Quasi-Public Corporations—Government.

The Mattamuskeet Drainage District is a statutory organization involving ultimately the public interest, but is primarily for the benefit of the private owners of land therein, and forms them into a *quasi*-public corporation conferring the power of eminent domain, and is not strictly speaking a subagency of the government in the administration of its local affairs.

5. Drainage Districts—Mattamuskeet Drainage District—Courts—Judgment—Res Adjudicata—Estoppel—Assessments.

While land under the provisions of the statute included in the Mattamuskeet Drainage District may be included against the consent of the owners, it may not be assessed unless in proportion to benefits conferred thereon, but when assessments have been made in the proceedings in the court designated by the statute, and have been finally adjudicated therein, the final judgment is *res adjudicata* as to such assessment, and will operate as an estoppel, unless changed or modified by a motion in the cause.

6. Same—Assessments—Status of Incorporation—Members—Petitioners.

Under the provisions of the statute creating the Mattamuskeet Drainage District, those who have their lands located within the district and who have not signed the petition, become members of the corporation so formed involuntarily by virtue of the judgment entered, which has assessed all the lands according to the benefits conferred, in which those who have signed the petition have an interest arising from the fact that to disturb or diminish the assessments of those who claim no benefit to their land, would either increase the assessments or render the assessments laid in the proceedings insufficient for the required purpose of the organization.

7. Same—Vested Rights—Constitutional Law.

The rights of landowners in the Mattamuskeet Drainage District having been determined in a court having jurisdiction as to assessments in proportion to the benefits conferred, cannot be affected by chapter 7, Public Laws of 1921, providing that "the districts heretofore or hereafter created under the law shall be and constitute political subdivisions of the State," later enacted, for such would be to impair the vested rights of those whose property had been assessed by the final judgment.

8. Same—Statutes—Retroactive Laws.

The Legislature has no power to impair vested rights acquired by landowners in the Mattamuskeet Drainage District under the final judgment of the court in proceedings in conformity with the statutes, by afterwards declaring that the district was a political subdivision of government upon the ground that over such agencies the Legislature has larger powers. Const. of N. C., Art. VII, sec. 12; Art. VIII, sec. 1.

O'NEAL *v.* MANN.

APPEAL by plaintiffs from *Grady, J.,* at May Term, 1926, of HYDE. Reversed.

Controversy without action, involving the validity of chapter 611, Public-Local Laws 1925, entitled "An Act Excluding Certain Lands from Mattamuskeet Drainage District."

The court was of opinion, first, that the enactment of said act was a valid exercise by the General Assembly of its legislative power, and, second, that lands of defendants, therefore included within said district, having been excluded therefrom by said act, are not liable for assessments made by the board of drainage commissioners for the maintenance of said district.

Judgment was thereupon rendered, perpetually restraining and enjoining said board of drainage commissioners from collecting any assessments made upon said lands, since the ratification of said act, and also from levying any further assessments thereon.

From this judgment, plaintiffs appealed to the Supreme Court.

W. L. Spencer for C. S. O'Neal et al.
C. B. Spencer for New Holland Corporation.
S. S. Mann for T. H. Jennette.
Small, MacLean & Rodman for Board of Drainage Commissioners.
Ward & Grimes for defendants.
Stephen C. Bragaw amicus curiæ.

CONNOR, J. This appeal was docketed at the Spring Term, 1926, of this Court, after the call of appeals from the First District, and shortly before the expiration of said term. By consent of counsel, it was submitted without oral argument, upon printed briefs of both sides. Rule 10. A brief in support of the judgment of the Superior Court was filed by Hon. Stephen C. Bragaw, with the permission of the Court, as *amicus curiæ.*

An examination of the record disclosed that the question presented for decision was of grave importance not only to the parties to this controversy, but also to owners of lands included in other drainage districts, established under the laws of this State. The validity of an act of the General Assembly is involved by the contention of plaintiffs that said act is an exercise of judicial and not of legislative power, and is therefore in contravention of section 8 of Article I of the Constitution of North Carolina, in which it is declared that "the legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other." At the conclusion of the Spring Term, the appeal was continued, upon an adversari, to the Fall Term, 1926. It was ordered that the appeal should then be heard upon oral arguments.

These arguments have been heard; we have been greatly aided in the consideration of the appeal and in the decision of the question presented, not only by the well prepared and exhaustive briefs filed, but also by the oral arguments of the learned counsel who appeared in behalf of the respective parties to this controversy, in response to our request.

The question presented for our decision is this: Has the General Assembly of this State the power, by the enactment of a Public-Local statute, to exclude from a drainage district, established and organized under the laws of this State, certain lands described in the statute, and theretofore included within the district by the final order of the clerk of the Superior Court, made in the proceeding for the establishment of said district, upon the recital in the statute that said lands have not received the benefits contemplated at the time the district was established? Are lands so excluded relieved of liability for assessments thereafter made for the purpose of maintaining the district, with the result that assessments made upon the lands remaining therein for that purpose are necessarily increased?

If it shall be held that the General Assembly has such power, it is manifest that it will be invoked, as it has been in the instant case, by those whose lands have been included in a drainage district, established by law, upon a finding by the court that the same will be benefited by the establishment of the district, and who thereafter wish to have said lands relieved of assessments for the maintenance of the district, upon the contention, that the results from the establishment of the district were not as contemplated by the parties to the proceeding, and as the court, by whose order the district was established, found that they would be.

If chapter 611, Public-Local Laws 1925, was enacted by the General Assembly in the valid exercise of its legislative power, and the lands described therein are thereby excluded from said district for all purposes, except as provided therein, with respect to liability for bonds outstanding, it would seem to follow necessarily that they are relieved of all assessments thereafter made for the maintenance of said district, and that there was no error in the judgment restraining and enjoining the board of drainage commissioners from collecting assessments upon the lands of defendants which are embraced in the boundaries of the land excluded, levied since the ratification of said act, or from levying further assessments upon said lands. The only apparent purpose for the enactment of the statute was to relieve the lands described therein from liability for such assessments. If this purpose has been accomplished, it is agreed that it will result in an increase of the assessments upon the lands of plaintiffs, and upon the lands of others remaining in said district. Manifestly the rights of owners of lands remaining in the

district are affected by the statute excluding certain lands therefrom; in order to justify this result, it is recited in the statute that the lands excluded have not received the benefits contemplated at the time the district was established. No opportunity has been afforded to those whose assessments will be increased, for a hearing upon the contention that the excluded lands have not been benefited by the organization of the district and the improvements made therein; there has been no investigation to determine the truth of the recital, relied upon as a justification of the statute. The burdens upon the lands of plaintiffs, which it was required by statute should be assessed in proportion to the benefits received by said lands, and which it was contemplated would be shared by the lands excluded, in proportion to the benefits which said lands would also receive will necessarily be increased if chapter 611, Public-Local Laws 1925, shall be held valid. It is provided in the statute that the land excluded thereby "shall remain liable for its pro rata liability for said outstanding bonds of the district." It is agreed that there are now no bonds of the district outstanding, all the bonds theretofore issued having been paid; the proviso, however, is evidence of a recognition by the General Assembly that the statute would otherwise affect vested rights of bondholders. There is no provision in the statute relative to the liability of the land excluded thereby for assessments authorized to be made for the maintenance of the district. It is contended by plaintiffs that owners of lands remaining in the district have vested rights with respect to the liability of the lands excluded for assessments of which they cannot be deprived by an act of the General Assembly.

The Mattamuskeet Drainage District was established by a proceeding authorized by and conducted in full compliance with the provisions of chapter 442, Public Laws 1909, which as amended is now Article V, subchapter 111, of chapter 94 of the Consolidated Statutes, 1919. This Court has held that said act is constitutional, and that its enactment was a valid exercise of legislative power. *Lumber Co. v. Drainage Comrs.,* 174 N. C., 647; *Drainage Comrs. v. Mitchell,* 170 N. C., 324; *Griffin v. Drainage Comrs.,* 169 N. C., 642; *Shelton v. White,* 163 N. C., 90; *Newby v. Drainage District,* 163 N. C., 24; *Sanderlin v. Luken,* 152 N. C., 738; *Kinston v. Loftin,* 149 N. C., 255. The State Board of Education, at that time the owner of the land known as "The Lake Bottom," was a party to the proceeding for the establishment of the district, as authorized by chapter 509, Public Laws 1909. The plaintiff, New Holland Corporation, is now the owner of said Lake Bottom, claiming under the State Board of Education; the other individual plaintiffs are owners of lands which are not embraced in the boundaries of the land excluded by the statute, but which were included in the district when established by the final order of the clerk of the Superior Court of

Hyde County. Defendants are owners of lands included in the district when it was established; these lands are embraced within the land excluded by the statute.

If the proceeding under which Mattamuskeet Drainage District was established was a judicial proceeding, in which the rights of all the parties were finally adjudicated, then each of said parties is bound by the orders and judgments made therein; all matters which were required by statute to be finally determined before the district was established, are as to said parties, and as to those claiming under them, *res adjudicata.* They are estopped from thereafter questioning by independent suit, or otherwise, except by motion in the cause, made upon well recognized grounds for such motions, the judgment establishing the district, or the validity or amount of assessments made in the cause, or the matter of burdens and benefits affecting the lands included in the district at the time of its organization. It has been held by this Court that such orders and judgments are estoppels of record upon the parties to the proceeding, and that matters determined thereby are *res adjudicata;* this conclusion was reached, because the proceeding for the establishment of a drainage district, authorized by the statute, was held to be a judicial proceeding. *Spencer v. Wills,* 179 N. C., 175; *Craven v. Drainage Comrs.,* 176 N. C., 531; *Lumber Co. v. Drainage Comrs.,* 174 N. C., 647; *Banks v. Lane,* 170 N. C., 41, and on rehearing, 171 N. C., 505; *Griffin v. Comrs.,* 169 N. C., 642; *Newby v. Drainage District,* 163 N. C., 24; *Shelton v. White,* 163 N. C., 90. In *Spencer v. Wills, supra, Hoke, J.,* says: "These and other like rulings must be challenged at the proper time, and in the course of the proceedings, and unless objection is successfully maintained, the parties are concluded."

It is expressly provided by statute that no lands included in a drainage district, established thereunder, shall be assessed for drainage tax, unless the court shall find that such lands will be benefited by the establishment of the district, C. S., 5323, and that all lands so included, which the court shall find will be benefited, shall be assessed in proportion to the benefits received. C. S., 5329. The right of appeal from an order including lands in the district to the Superior Court of the county, in term time, is secured to any party who thinks that his land, included in the district, will not be benefited by its establishment and organization. C. S., 5324. The statute under which the Mattamuskeet Drainage District was established clearly provides that the question as to whether or not lands included therein will be benefited by the district, and therefore liable for assessments for its maintenance, shall be determined by the court upon which jurisdiction is conferred for that purpose. In recognition of this principle, and also to provide for the relief of a landowner, with respect to whose land experience had shown that the results

contemplated had not been realized, the General Assembly enacted chapter 439, Public-Local Laws 1923. It is therein provided that where it has been found from experience, that one or more tracts of land included in any drainage district established in Hyde County, cannot be successfully drained for agricultural purposes, such lands may be excluded from the district, upon petition to the board of drainage commissioners, and thereafter relieved of assessments for the maintenance of the district. If upon application to the board of drainage commissioners, relief is denied, an appeal may be taken by the petitioner to the Superior Court of Hyde County, "which shall have full power and authority to find the facts and grant relief as in other suits in equity." This statute is a clear indication that the General Assembly recognized that the proceeding under which Mattamuskeet Drainage District was established was a judicial proceeding, and that relief, such as defendants now seek, was properly to be had by petition filed in said proceeding.

It is contended, however, on behalf of defendants, and in support of the judgment of the Superior Court, that a proceeding for the establishment of a drainage district, under the statute applicable to this controversy, is not a judicial proceeding in which the rights of the parties with respect to the matters involved therein are finally adjudicated, but is merely an administrative proceeding, authorized by the General Assembly, and resulting in the organization of a governmental agency, within a political subdivision of the State, whose boundaries are determined in such proceeding, as in the case of a county, city or town, or a school district or road district; that a drainage district, established under statutory authority, is merely an instrument for the accomplishment of a governmental purpose; that conceding that there are decisions of this Court to the contrary, holding that drainage districts, organized under an act of 1909, as amended, are not mere governmental agencies, but are *quasi*-public corporations, created for private benefit, and endowed with the power of eminent domain and other governmental functions for the public benefit (*Canal Co. v. Whitley,* 172 N. C., 100 and *Pate v. Banks,* 178 N. C., 139), the purpose and effect of chapter 7, Public Laws 1921, is to constitute such districts, both those established since and those established prior to the enactment of said statute, political subdivisions of the State, and therefore subject to the exercise of legislative power with respect to their boundaries as well as with respect to other matters affecting said districts. If these drainage districts are mere political subdivisions of the State, organized as governmental agencies, for the accomplishment, chiefly of governmental purposes, and only incidentally for private benefit, these contentions seem to be well founded. There are authoritative decisions of this Court which sustain the contentions of defendants that drainage districts, if they are governmental

agencies, established for governmental purposes, are subject to the legislative power of the General Assembly, with respect to their boundaries.

The General Assembly has the power, by statute, to create or to provide for the creation of a political subdivision of the State, and for the government thereof, to the end that same may function as an agency of the State, for the accomplishment of some well recognized governmental purpose. The State may thus provide in the exercise of its police power for the protection of the public health. *Reed v. Engineering Co.,* 188 N. C., 39. A statute enacted for the accomplishment of a governmental purpose by the creation of a governmental agency, within a political subdivision of the State, even if such agency is constituted a corporation, involves no sort of contract between the General Assembly, on the one part, and citizens of the locality affected, on the other part. Such governmental agency, even if a municipal corporation, is under the control, in all respects, of the General Assembly and is subject as to all matters which affect such agency or such corporation to its legislative will, restricted only by pertinent constitutional provisions. The General Assembly may by statute alter, amend or repeal, without the approval and contrary to the wishes of persons affected thereby, any statute under which a public corporation, created as a governmental agency for a public purpose, was organized. This power arises from a different principle from that by which the General Assembly is authorized to alter, amend or repeal a statute under which a private corporation may have been organized. The power in the latter instance is expressly reserved in the Constitution of this State. Art. VIII, sec. 1.

The distinction between a public and a private corporation in this respect is clearly drawn by *Pearson, J.,* in *Mills v. Williams,* 33 N. C., 558. He says, "The substantial distinction is this: Some corporations are created by the mere will of the Legislature, there being no other party interested or concerned. To this body a portion of the power of the Legislature is delegated to be exercised for the public good, and subject at all times to be modified, changed or annulled. Other corporations are the result of contract. The Legislature is not the only party interested, for, although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a second party. These two parties make a contract. The Legislature, for and in consideration of certain labor, and outlay of money, confers upon the party of the second part the privilege of being a corporation, with certain powers and capacities. The expectation of benefit to the public is the moving consideration on one side; that of expected remuneration for the outlay is the consideration on the other. It is a contract and therefore cannot be modified, changed or annulled without the consent of both parties." Since the Constitution of 1868, the last statement must be modified, for while

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it is therein provided that corporations may be formed under general laws, or, in certain instances, under special acts, power to alter, from time to time, or to repeal such general laws or special acts is expressly reserved. The distinction, however, as drawn so clearly by *Pearson, J.*, has been uniformly recognized and the principle underlying it has been consistently applied in decisions of this Court.

In *Manly v. Raleigh,* 57 N. C., 370, it was held that the General Assembly has power to incorporate a town or to extend or contract the limits of one already incorporated, whenever, in its opinion public policy requires it to be done. In *Ward v. Elizabeth City,* 121 N. C., 3, *Clark, J.*, says: "The Legislature, at its discretion can abolish counties *(Mills v. Williams,* 33 N. C., 558) and, of course, cities and towns (*Lilly v. Taylor,* 88 N. C., 489) and also all other corporations (Const., Art. VII, sec. 12 and Art. VIII, sec. 1) since they are all alike creatures of its will, and exist only at its pleasure." In *Lutterloh v. Fayetteville,* 149 N. C., 65, *Brown, J.*, says: "We have held in common with all the courts of this country that municipal corporations, in the absence of constitutional restrictions, are the creatures of the legislative will and are subject to its control; the sole object being the public good, and that rests in legislative discretion."

This Court has uniformly held in decisions sustaining the constitutionality of chapter 442, Public Laws 1909, as amended by subsequent statutes, that a drainage district, established by a proceeding in accordance with the provisions of said statute is not a municipal corporation falling under the classification which includes counties, cities or towns, school districts or road districts; but that such district is a *quasi*-public corporation, created for private benefit. The primary purpose of such districts is the drainage of lands included therein for agricultural purposes; this is not a public purpose, to be accomplished by a governmental agency. The benefits chiefly contemplated accrue to the owner of the land from its increased productivity, resulting from drainage. Only lands which are benefited are subject to assessments; but all lands included in the district, which are benefited, are subject to assessments, the amount of the assessment upon the land of each owner being determined by the benefit which the said land receives. A drainage district may be established under the statute only upon a petition signed by a majority of the resident landowners in the proposed district, or by the owners of three-fifths of all the lands which will be affected or assessed for the expense of the proposed improvements. C. S., 5314. Landowners who sign the petition become voluntarily members of the corporation upon its organization pursuant to the final order in the proceeding in which the petition is filed.

Lands embraced in the boundaries of a proposed district whose owners are unwilling to join in the petition or who oppose the establishment of the district, may be included therein only upon a finding by the court that such lands will be benefited by the drainage resulting from the establishment and organization of the district; the court has the power to include such lands in the district, and to assess them for their proportionate share of the expense, only because of the benefits which they will receive. Power is conferred upon courts to include lands whose owners are unwilling to join in the petition, or who are opposed to the establishment of the district, because in addition to the private benefit, there is also a public benefit contemplated from the establishment of a drainage district. It is declared by statute "that the drainage of swamp lands and the drainage of surface water from agricultural lands and the reclamation of tidal marshes shall be considered a public use and benefit and conducive to the public health, convenience and welfare." It is because of the benefits which accrue to the public from the establishment of a drainage district under the statute, that power conferred thereby upon the court to include lands of owners who are unwilling to sign the petition, or who oppose the establishment of the district is sustained.

With respect to landowners who sign the petition, and thereby voluntarily become members of the corporation organized within the district, the corporation is for a private purpose and is therefore a private corporation; but with respect to landowners, who do not sign the petition, and who become members by virtue of the order or judgment of the court, the corporation partakes of the nature of a public corporation. These latter become members not voluntarily, but by virtue of a judgment of a court, which hears before it adjudges. The right to condemn lands for purposes of right of ways and other purposes is conferred upon the corporation, because it serves the public interest. Adequate compensation must be made for private property taken by the corporation, under the power of eminent domain.

This Court has found it necessary in the consideration of questions presented for decision, in which these drainage districts were involved, to determine their nature. In *Canal Co. v. Whitley,* 172 N. C., 100, it is said by *Brown, J.,* writing for the Court: "Drainage districts are regarded as *quasi*-public corporations created for private benefit but endowed with the power of eminent domain and other governmental functions for the public benefit, *Sanderlin v. Luken,* 152 N. C., 738; *Drainage Comrs. v. Farm Assn.,* 165 N. C., 697." In *Pate v. Banks,* 178 N. C., 139, *Clark, C. J.,* says: "The drainage system was deemed by the Legislature a measure required for the public benefit. While a drainage district is not a governmental agency like a township, or county

(*Sanderlin v. Luken,* 152 N. C., 741; *Drainage Comrs. v. Webb,* 160 N. C., 594; *Leary v. Drainage Comrs.,* 172 N. C., 26), it is a geographical *quasi*-public corporation, and the bonds issued by it for the improvements of the district, like bonds issued for public roads or other purposes, become an indebtedness of the district and not of any landowner therein." In *Lang v. Development Co.,* 169 N. C., 662, *Hoke, J.,* says: "It has long been recognized that our lowlands, particularly in the eastern part of the State, are of such extended area and give such promise of productive fertility and their proper drainage affects the public weal to such a degree that the power of eminent domain, when properly safeguarded, may well be conferred upon corporations or companies engaged in this work when in a given case, it is of such extent that the exercise of the power is required for the efficient carrying out of the enterprise." In *Leary v. Comrs.,* 172 N. C., 25, it is held that a drainage district created under the drainage statute is not a political agency of the State, and is liable for the wrongful diversion of water to the damage of a lower proprietor of lands lying beyond the boundaries of the district, when those claiming such damages are in no wise claiming under such proceedings or under any party thereto. *Clark, C. J.,* says: "Drainage districts are favored because of the public benefit, but none the less the prime motive in organizing them is the pecuniary benefit to the corporations. The State confers on them the right of eminent domain, but cannot exempt them from taxation, or exempt them from liability. They are on the same footing in these respects with other *quasi*-public corporations." Again, "These drainage districts are created for the benefit of the people of the locality and are favored with certain privileges of eminent domain and otherwise because of the general benefit to the public. But they are not exempt from liability for their torts or contracts." In *Sawyer v. Drainage District,* 179 N. C., 182, *Hoke, J.,* says: "It is held in this jurisdiction that these drainage districts, established under the provisions of our present statutes, are liable for wrongs and torts committed on the property of adjoining proprietors whose lands are not embraced in the district. While they may have certain municipal powers bestowed upon them, the better to carry out their purpose, being organized primarily for the benefit of individual owners, they are not regarded as municipal corporations in the constitutional sense of the term, nor protected as governmental agencies from suits by individuals except when the same may be authorized by law. They are classed rather with railroads and other *quasi*-public corporations, and may be held liable, as stated, for wrongful invasion of the proprietary rights of third persons." *Leary v. Comrs.,* 172 N. C., 25; *Sou. Assembly v. Palmer,* 166 N. C., 75, and other cases cited.

Upon authoritative decisions of this Court, and after full consideration of the principles upon which those decisions were made, we are of the opinion that Mattamuskeet Drainage District was not, upon its organization under chapter 442, Public Laws 1909, a public or municipal corporation, functioning as a governmental agency, within a political subdivision of the State.

Defendants contend, however, that the General Assembly by chapter 7, Public Laws 1921, has declared that said district, is a political subdivision of the State and that, therefore, it should now be held that said district is a governmental agency for a public purpose, that the corporation is a public or municipal corporation, and is subject in all respects to the legislative will. Whatever may have been the purpose of the General Assembly in enacting this statute, and thereby amending chapter 442, Public Laws 1909, it cannot be held to have affected the nature or character of a district established prior to its enactment. It is provided in the statute that "the districts heretofore and hereafter created under the law shall be and constitute political subdivisions of the State." Parties to a proceeding instituted prior to the enactment of the act of 1921, whose rights under the statute then in force have been adjudicated and finally determined by orders and judgments therein, cannot be deprived of such rights by a legislative declaration as to the nature of the district established by the proceeding. That such was not the purpose of the General Assembly we think is manifest, for at its next session it enacted chapter 439, Public-Local Laws 1923, which is a recognition by the General Assembly that the proceeding under which this district was established was a judicial proceeding, and that parties thereto who had acquired rights under orders and judgments therein could not be deprived of such rights without an opportunity to be heard in said proceeding. See *Cole v. Norborne Land Drainage District,* 46 Sup. Ct. Reporter, 196, opinion of *Mr. Justice Holmes,* filed 1 Februray, 1926.

The Mattamuskeet Drainage District is now, as it has been since its organization, a *quasi*-public corporation, organized primarily for the benefit of owners of lands included therein, serving, however, to promote the public welfare, and therefore organized without regard to whether all the landowners consented to its organization. It is not, therefore, subject to the legislative will of the General Assembly with regard to its boundaries; such boundaries can be neither extended nor contracted by statute. Whether or not lands included in the district have received benefits from the establishment and maintenance thereof, and shall therefore be assessed in proportion to said benefits, or be relieved of further assessments, because of a failure to receive benefits, may be determined upon petition filed in the proceeding as provided in chapter 439, Public-Local Laws 1923. The court has ample power to determine

what the facts are upon a contention that lands in the district have not been benefited, and to afford adequate relief if the contention is sustained. The recital in chapter 611, Public-Local Laws 1925, that the lands described therein have received no benefits is not conclusive upon parties to the proceeding, or upon those who claim under such parties; a finding by the court, however, after a hearing upon notice, will be conclusive and binding upon all parties.

We are further of the opinion that chapter 611, Public-Local Laws 1925, cannot be held valid as an exercise of power reserved by section 1, Art. VIII of the Constitution to alter, amend, or repeal any general law or special act, providing for the formation of a corporation, other than municipal. This statute does not purport to alter or amend the general law under which Mattamuskeet Drainage District was formed, as affecting the corporation; its effect, if valid, is to discriminate between owners of lands thereby excluded, and owners of lands remaining in the district, relieving the former of burdens imposed by law, upon a judicial finding of fact, and increasing the burdens imposed thereby upon the latter. It deprives each of the landowners, whose lands remain in the district of the right to have all the lands included in the district, at the time same was established to share in the burden of maintaining the district, in proportion to benefits received. The power of the General Assembly, under section 1, Art. VIII of the Constitution, with respect to amendments of general laws or special acts, providing for the formation of corporations other than municipal, is subject to limitation. Such power cannot be exercised for the purpose, or with the effect of depriving individuals of rights acquired under the law. *S. v. Morris*, 77 N. C., 512; *Power Co. v. Elizabeth City,* 188 N. C., 278. See *Garey v. St. Joe Mining Co.* (Utah), 12 L. R. A., N. S., 554.

We do not concur in the opinion of the Superior Court that the enactment of chapter 611, Public-Local Laws 1925, was a valid exercise of legislative power. There are decisions in other jurisdictions which sustain this opinion, based upon the holdings of the courts of these jurisdictions as to the nature of drainage districts organized under statutes in force therein. Our decision is in accord with the holdings of this Court with respect to the nature of a drainage district organized under chapter 442, Public Laws 1909, as amended, and is, we think, supported not only by these decisions, but also by principles which are fundamental and applicable to the question presented by this appeal. In accordance with this opinion, the judgment must be

Reversed.

LENWOOD E. CLARK v. FEDERAL LIFE INSURANCE COMPANY.

(Filed 26 January, 1927.)

1. **Insurance, Accident—Policies—Contracts—Receipts for Premiums—Instructions—Appeal and Error.**

   The printed matter upon the back of a receipt given to the insured under an accident policy as to the value of the policy issued, is no part of the contract and cannot effect an increased liability on the part of the insurer for a loss arising thereunder, and error in admitting it in evidence is cured by an instruction of the court making the liability of the insurer dependent entirely upon the terms of the policy contract.

2. **Insurance, Accident—Delay by Insurer to Deliver Policy to the Insured—Actions.**

   Where a policy of accident insurance has been issued before the accident in suit, and its delivery by error or oversight of the insurer has been delayed beyond that time, and the premiums have been paid, the action thereon may be maintained.

3. **Appeal and Error—Insurance, Accident—Misrepresentations.**

   Where a policy of accident insurance has been issued and accepted by the insured, nothing else appearing, the insured may not contend on appeal that the policy differed materially from the one applied for, when such right has not been properly presented upon the trial.

4. **Insurance, Accident—Stipulations as to Delay in Amputating Foot—Valid Provisions.**

   Where among other things in a policy of accident insurance, that to recover for the loss of a foot, it is provided that the foot must have been amputated within thirty days from the date of the accident: *Held*, the stipulation is a valid and enforceable one, whatever the insured's reason for a delay in amputating the foot may have been, when not consented to by the insurer.

5. **Insurance, Accident—Policies—Contracts—Provisions — Approval of Insurance Commissioner—Evidence.**

   The approval of the Insurance Commissioner of a form of accident insurance is weighty evidence of the validity of its provisions, but not controlling upon the courts. C. S., ch. 106, subch. 5, art. 23.

6. **Insurance, Accident — Policies — Contracts — Provisions — Alternate Liability.**

   Where an accident insurance policy creates a liability for loss of time and a foot, but restricts the right of the insured to recover loss on only one of them: *Held*, the provision is valid, and he may not recover for both in his action.

7. **Tender—Payment—Checks—Insurance, Accident.**

   A check given by the insurer to the insured in payment for an acknowledged liability, as to a part of its liability is not a legal tender to support a plea of payment.

CLARK *v.* INSURANCE CO.

APPEAL by defendant from *Lane, J.*, at May Term, 1926, of CALDWELL. New trial.

Action upon policy of accident insurance, dated 21 April, 1925. Plaintiff contends that under the provisions of said policy defendant is liable to him in the sum of $1,000, for the loss of a foot, resulting from injuries received on 28 June, 1925, caused by the wrecking of an automobile in which plaintiff was riding; also in the sum of $260.00 for weekly indemnity, in accordance with the provisions of the policy.

Defendant denies liability on account of the loss by plaintiff of his foot, and pleads payment of the sum of $260.00 in full discharge of all liability under the policy.

The issue submitted to the jury was answered as follows: "What amount, if any, is plaintiff entitled to recover of defendant? Answer: $1,000.00."

From judgment on the verdict, defendant appealed to the Supreme Court.

W. C. Newland and Squires & Whisnant for plaintiff.

M. H. Yount, Pou & Pou and J. L. Emanuel for defendant.

CONNOR, J. There was no conflict in the evidence offered upon the trial of this action. The uncontroverted facts pertinent to the issue submitted to the jury, without objection from either plaintiff or defendant, were as follows:

1. On 21 April, 1925, defendant issued to plaintiff a receipt, in writing, in form as follows:

$2.00 4/21/25

OFFICIAL RECEIPT FOR ANNUAL PREMIUM
ON FEDERALIZED TRAVEL ACCIDENT POLICY

Received of Linwood E. Clark the sum of two and no/100 in payment of the annual premium for a Federalized Travel Accident Policy, maintaining said policy in force for one year from date of its issuance.

This receipt is not valid unless signed by a duly authorized representative.

CLARENCE E. LACKEY, *Duly Authorized Representative.*

FEDERAL LIFE INSURANCE COMPANY, O. E. MARLEY, *Treasurer.*

On the back of this receipt is printed the following:

FEDERAL TRAVEL ACCIDENT POLICY
See What Two Dollars Will Do

For injuries due to wrecking or disablement of any private or public automobile, street car, railroad train, or steamboat while insured is therein, or is thrown therefrom, or while in a burning building:

Loss or life	$2,000.00
Loss of 2 limbs or 2 eyes	2,000.00
Loss of 1 limb or 1 eye	1,000.00
Weekly indemnity of $20.00 per week, limit 13 weeks.	
Loss of life	$ 500.00

caused by being struck, or knocked down, or run over, while walking or standing on a public highway, by automobile, horse-drawn vehicle, street car or train.

All for only $2.00 per year.

FEDERAL LIFE INSURANCE COMPANY,
Chicago

ISAAC MILLER HAMILTON, *President.*

2. On 28 June, 1925, an automobile in which plaintiff was riding with friends, was wrecked by an accident. The automobile turned over and caught fire. Plaintiff was injured, his leg being badly burned below the knee. Because of the injuries then and there sustained, plaintiff was taken to a hospital, where he received medical and surgical treatment for his injuries. He was wholly unable and prevented by said injuries from performing any duty pertaining to any kind of business, labor or occupation continuously for more than thirteen weeks.

Plaintiff's leg was so badly burned in the wreck of the automobile that fragments of flesh were trimmed off by the surgeon within a week after his injury. He was advised by a physician to have the leg amputated, but objected to the amputation, because of his suffering, and also because he hoped that his leg might be saved. The flesh began to decay, and the tendons of his leg sloughed off, exposing the bone. Finally, on 17 August, 1925, the leg was amputated by a surgeon, six inches below the knee. The amputation was necessary because of the injuries received by plaintiff in the automobile wreck. Plaintiff has suffered the loss of a foot, from an injury received while riding in an automobile, which was wrecked by an accident; the foot was amputated above the ankle, more than thirty days after the injury was sustained.

3. No policy of insurance had been delivered to plaintiff or issued by defendant at the time plaintiff was injured, to wit: 28 June, 1925. The application for the policy, signed by plaintiff on 21 April, 1925,

the day on which the premium was paid and the receipt delivered, had in some way been mislaid or overlooked by defendant. A claim was filed by plaintiff with defendant after 28 June, 1925, on account of injuries received by him on said date, and on 28 July, 1925, defendant issued and delivered to plaintiff a policy of insurance, bearing date 21 April, 1925. This policy bears on its face the words, "Federalized Travel Accident Policy." It is in the form filed with and approved by the Insurance Commissioner of the State of North Carolina. This policy was received and accepted by plaintiff after 17 August, 1925, the day on which his leg was amputated by the surgeon. It was offered in evidence at the trial by plaintiff.

By the terms of this policy, defendant insured plaintiff, "against death or disability resulting directly and independently of all other causes from bodily injuries sustained through external, violent and accidental means, subject to the limitations and conditions herein contained."

Pertinent provisions of the policy are as follows: Part I. "If the insured by the wrecking or disablement . . . of a motor driven car . . . suffer any of the specific losses set forth below in this Part I, the company will pay the sum set opposite such loss:

For loss of	
Life	Two thousand dollars ($2,000.00)
Both hands	Two thousand dollars ($2,000.00)
Both feet	Two thousand dollars ($2,000.00)
Sight of both eyes	Two thousand dollars ($2,000.00)
Either foot	One thousand dollars ($1,000.00)"

Part III. "If the insured sustains injuries in any manner specified in Part I which shall not prove fatal, or cause loss as aforesaid, but shall immediately, continuously, and wholly disable and prevent the insured from performing each and every duty pertaining to any and every kind of business, labor or occupation during the term of such disablement, but not exceeding three consecutive months, the company will pay indemnity at the rate of twenty dollars ($20.00) per week."

General Provisions: "(1) In every case referred to in this policy, the loss of any member or members shall mean loss by severance at or above the ankle or wrist joints; and the loss of sight of eye or eyes shall mean the total and irrecoverable loss of the entire sight thereof."

"(2) Not more than one of the indemnities specified above shall be payable as the result of any one accident."

"(3) No indemnity will be paid for death caused by other means or other conditions than those set forth in Part I or II, nor will indemnity

be paid for loss of limb or sight caused by other means or under other conditions than those set forth in Part I, nor in any case where death or such other loss does not occur within thirty days from the date of the accident. No indemnity will be paid for disability caused by any other means, or under other conditions than those specified in Part III. In event of specific loss no indemnity shall be paid for loss of time."

4. After the policy was issued by defendant, and delivered to and accepted by plaintiff, and at a date prior to 21 November, 1925, defendant issued and delivered to plaintiff its check for $260.00, in discharge of its liability under the policy on account of the weekly indemnity, which it admitted; plaintiff did not return said check, nor has he endorsed it. At the time of the trial, in May, 1926, the check was in the possession of plaintiff's attorney. Neither plaintiff nor his attorney has offered to return the check to defendant.

This is no contention that said check, if properly endorsed and presented for payment, will not be paid, according to its tenor. Plaintiff has not endorsed the check and presented it for payment because he contends that defendant is liable to him not only for the amount of the check, but also for the sum of $1,000.00, on account of the loss of his foot.

Upon the foregoing facts, the rights of plaintiff and the liabilities of defendant, with respect to the subject-matter of this action, are to be determined, as correctly held by the trial judge, by the terms and provisions of the policy and not by the receipt.

The receipt was primarily an acknowledgment by defendant of the payment by plaintiff of the annual premium for a "Federalized Travel Accident Policy," to be in force for one year from the date of its issuance. It is also evidence of a contract by which defendant agreed to issue to plaintiff, a policy of insurance such as that described therein. It is in the nature of a "binder," or "memorandum," such as was held valid in *Lea v. Ins. Co.*, 168 N. C., 478. It does not purport to be a policy of insurance, or to contain the terms and conditions of a contract of insurance. Whether defendant became liable under the terms of the policy for which plaintiff paid the premium, on the date of the receipt, or on the date of the actual issuance of the policy, is not presented by any contention upon this record, for defendant at the time of its issuance dated the policy 21 April, 1925. Defendant conceded that it became liable to plaintiff in accordance with the provisions of its Federalized Travel Accident Policy, on 21 April, 1925. It therefore dated the policy issued thereafter on said date. This policy was accepted by plaintiff, upon its delivery to him after the date on which his foot was amputated, and was introduced as evidence upon the trial of this action by plaintiff.

In his complaint, plaintiff alleges that the policy issued by defendant, differed in material respects from the policy which defendant had agreed to issue. This allegation was denied in the answer of defendant. No issue with respect to this matter was tendered for submission to the jury. In the absence of a finding by the jury, in answer to an appropriate issue, that said policy was not in all respects the identical policy which defendant had agreed to issue for the premium paid by plaintiff on 21 April, 1925, it must be held upon all the facts shown by the evidence, that by the issuance and delivery of said policy, defendant complied fully with its contract dated 21 April, 1925. The statement printed on the back of the receipt, showing in general terms the specific sums which will be paid for specific losses, is no part of the contract of insurance. *Graham v. Ins. Co.*, 176 N. C., 315. The admission of the statement as evidence was error; it was not, however, prejudicial, for the court instructed the jury that defendant's liability to plaintiff for any claim or claims for loss resulting from injuries sustained in the wreck of the automobile on 28 June, 1925, must be determined by the provisions of the policy, and not by the statement printed on the back of the receipt. The fact that the policy was actually issued subsequently to the date on which the injuries were sustained, is immaterial upon the facts of this case. *Rayburn v. Casualty Co.*, 138 N. C., 379.

With respect to the claim for loss by plaintiff of his foot, it should be noted that the policy provides that no indemnity shall be paid for loss of a limb where such loss does not occur within thirty days from the date of the accident. The accident resulting in injuries to plaintiff's foot occurred on 28 June, 1925; the foot was amputated by the surgeon on 17 August, 1925. This was more than thirty days after the accident. It is further provided in the policy that the loss of a member shall mean the loss by severance at or above the ankle or wrist joints. Defendant is therefore not liable under the express provisions of the policy for the loss of plaintiff's foot, unless such loss was the result of its severance within thirty days from the accident. It cannot be held upon the facts established by the evidence in this case that there was a loss of a foot prior to 17 August, 1925; defendant is not liable for the loss on said date if the provisions of the policy, with respect to the time within which the loss shall occur after the accident, are valid.

The court instructed the jury that the provision in the policy that defendant should not be liable for a loss of limb by severance unless such loss occurred within thirty days after the accident, was unreasonable and against public policy, and therefore void. The form of the policy was submitted to and approved by the Insurance Commissioner of the State of North Carolina as required by statute. Chapter 106, Consolidated

Statutes, subchap. V, Art. 23. Such approval is not conclusive either upon the insured or upon the courts of this State; it is, however, entitled to great weight upon the contention that it is unreasonable and against public policy. We are unable to perceive upon what valid ground the limitation upon the insurer's liability can be held void. In view of the small premium received by the company for the policy, and the limited protection which the insured evidently desired, the provision is not unreasonable. There was error in the instruction that the provision in the policy, relied upon by defendant as determining its liability on account of the loss of plaintiff's foot, was void. Defendant's assignment of error based upon its exception to this instruction is sustained.

Upon all the facts established by the evidence, defendant is not liable under its policy to plaintiff for the loss of his foot. It is liable, however, for his loss of time and plaintiff is entitled to recover the sum of $260 as the weekly indemnity provided in the policy. Defendant admitted its liability for this sum and tendered its check in payment. The check, however, although it may be that when properly endorsed and presented for payment it will be paid, is not such legal tender as will sustain the plea of payment. *Lumber Co. v. Privette,* 178 N. C., 37. Upon all the evidence, the jury should have been instructed to answer the issue, "$260.00, with interest from the date on which said sum was due."

In view of our decision of the questions presented by defendant's appeal, it is not necessary to discuss the assignments of error upon plaintiff's appeal. Under the provisions of the policy, there can be a recovery of only one indemnity provided for therein. Plaintiff is not entitled to recover for the loss of his foot; if upon the facts he was entitled to recover for such loss, he could not recover for both loss of his foot and loss of time. He is entitled to recover indemnity for loss of time only.

It is apparent that there was no error in refusing defendant's motion for judgment as of nonsuit. There must be a

New trial.

W. D. MEYER v. W. PERRY REAVES.

(Filed 26 January, 1927.)

Deeds and Conveyances—Alleys—Estoppel In Pais.

Where the original owner of land in a city block has divided the same into business lots through which he has run a ten-foot alley with right of its use for the purposes of a hotel he constructed thereon, and has conveyed to an owner of a different lot adjoining the alley the right of a like use

therein, and has sold one or more of the subdivided lots to a purchaser who took with implied notice under registered deeds of the rights in the alleyway so conveyed, and also with actual notice, and has permitted the purchaser of the alleyway rights to use the same for a period of years, and to make heavy expenditures in contemplation of such use: *Held*, the purchaser of the lots adjoining the alley, is estopped in equity to deny the rights of the purchaser of the easement to use the same, and the principles applying to easements appendent, or appurtenant to lands or in gross is not controlling.

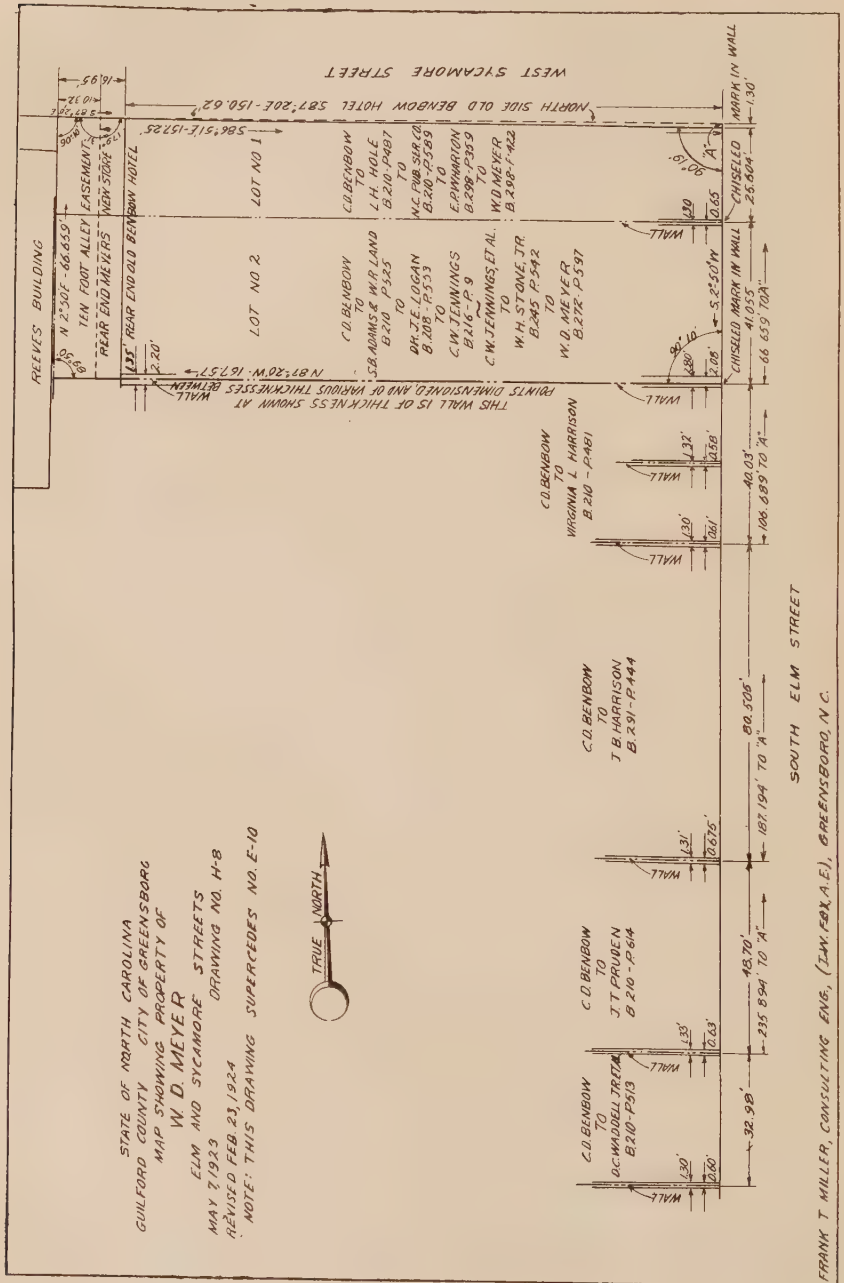
APPEAL from *Bryson, J.*, at March Term, 1926, of GUILFORD. Reversed. The facts will be stated in the opinion.

King, Sapp & King for plaintiff.
Hoyle & Harrison and Brooks, Parker & Smith for defendant.

CLARKSON, J. C. D. Benbow, on 1 July, 1909, owned a block of land in the city of Greensboro, N. C., in the southwest intersection of South Elm and West Sycamore streets, about 269 feet on South Elm Street and 168 feet on West Sycamore Street. This was subdivided into six lots, with an alleyway 10 feet wide in rear of the six lots that face on South Elm Street, the alley having its mouth in Sycamore Street. We are only concerned in this action with lots 1 and 2, as shown on map. The first lot 25.6 by 168 feet lies on the south side and is adjacent to West Sycamore Street, and the second lot, 41 by 168 feet adjacent to the first lot, and both lie on the west side of and adjacent to South Elm Street. The rear lines, over which is the 10-foot alley easement, of both lots 1 and 2 facing on South Elm Street, ran to the Lindsay line (the Lindsay land now owned by defendant Reaves) and thence with the Lindsay line in a northwardly direction.

C. D. Benbow, on 1 July, 1909, deeded lots 1 and 2: (1) Lot 1 to L. H. Hole, predecessor in title to Meyer; (2) Lot 2 to S. B. Adams and W. R. Land, predecessors in title to Meyer. In the deed to lot 1 is the following in regard to the alleyway: "There being hereby reserved for the benefit of the grantor, his heirs and assigns, an easement over, along and upon a 10-foot alley in the rear of the Benbow Hotel building and along the western boundary of the land hereinbefore described, for purposes of ingress and egress, with wagons, buggies or other vehicles, and for all necessary purposes. The easement and right of way hereby reserved being for the benefit of the grantors hereunder and of all owners of the Benbow Hotel property and their heirs and assigns forever."

The following in regard to Lot 2: "There being reserved for the benefit of the grantors and his heirs and assigns an easement over, along and upon a ten-foot alley in the rear of the Benbow Hotel building and


STATE OF NORTH CAROLINA
GUILFORD COUNTY CITY OF GREENSBORO
MAP SHOWING PROPERTY OF
W. D. MEYER
ELM AND SYCAMORE STREETS
MAY 7, 1923 DRAWING NO. H-8
REVISED FEB 23, 1924
NOTE: THIS DRAWING SUPERCEDES NO. E-10
TRUE NORTH
REEVES BUILDING
WEST SYCAMORE STREET
NORTH SIDE OLD BENBOW HOTEL S87°20E-150.62'
S86°51E-152.25'
N 2°30E - 86.659
TEN FOOT ALLEY
EASEMENT
REAR END MEYERS
NEW STORE
REAR END OLD BENBOW HOTEL
LOT NO 1
LOT NO 2
N87°20W-167.57'
135'
2.20'
C.D. BENBOW TO L.H. HOLE B.210-P481 TO W.C. PUB. SIR CO B.200-P389 TO E. WARRINGTON B.298-P389 TO W.D. MEYER B.298-P422
C.D. BENBOW TO SR. ADAMS & W.P. LAND B.210 P323 TO DH. JE LOGAN B.208 P533 TO C.W. JENNINGS B.216-P9 C.W. JENNINGS, ET AL. TO W.H. STONE, JR. B.245 P542 TO W.D. MEYER B.272-P597
THIS WALL IS OF THICKNESS SHOWN AT POINTS DIMENSIONED, AND OF VARIOUS THICKNESSES BETWEEN
WALL
CHISELED MARK IN WALL
MARK IN WALL
S 2°30'W
41.055
66.659 TO "A"
1.30'
0.65
2.05'
2.80'
C.D. BENBOW TO VIRGINIA L. HARRISON B.210-P481
C.D. BENBOW TO J.B. HARRISON B.291-P444
C.D. BENBOW TO J.T. PRUDEN B.210-P614
C.D. BENBOW TO McADDELL TRACT B.210-P513
80.505'
187.194' TO "A"
18.70'
235 894' TO "A"
32.98'
1.31'
0.675'
1.33'
0.63'
2.60'
SOUTH ELM STREET
FRANK T. MILLER, CONSULTING ENG., (LAW. FOX, A.E.), GREENSBORO, N.C.

along the western boundary of the land hereinbefore described for purposes of ingress and egress with wagons, buggies or any other vehicles, and for all necessary purposes. To have and to hold the above-described premises, together with the buildings situated thereon and the easements and appurtenances thereunto belonging to them, the said party of the second part, their heirs and assigns forever. . . . That the easement or right of way over the alley hereinbefore described shall be perpetual."

On 10 July, 1913, W. H. Stone, Jr., was the owner of Lot 2 with the alleyway right, as set forth above. Deeds from Adams and Land to Logan, Logan to Jennings, Jennings *et al.* to W. H. Stone, Jr.

W. H. Stone, Jr., on that date purchased an additional easement to the ten-foot alley to West Sycamore Street from C. D. Benbow and wife, which was duly recorded in Book 245, p. 547. The contract setting forth the facts and the purchase of Lot 2 by Stone goes on and says: "And whereas the Benbow Hotel property formerly belonged to Charles D. Benbow, and upon sale of the several portions thereof to different parties there was a reservation to the said Benbow of a ten-foot alley along the old Lindsay line in the rear of the Benbow Hotel, for the benefit of the said Benbow, his heirs and assigns, and such other persons or corporations as were then or should afterwards become owners of any part of said property, known as the Hotel Benbow property, the said Stone having purchased with this reservation of record, but desiring a grant of such easement to himself as one of the owners of a part of the Benbow Hotel property, . . . have given, granted, bargained, sold, and by these presents do give, grant, bargain and sell a perpetual easement and right of way over, along, in and upon an alleyway from the rear of the Hotel Benbow property, city of Greensboro, N. C., approximately ten feet wide, running along the old Lindsay line to Waddell's south line and opening on Sycamore Street, for the purpose of ingress and egress, and regress, with wagons, buggies and other vehicles, and for other purposes of ingress and egress. *To have and to hold to the said W. H. Stone, Jr., his heirs and assigns forever.*"

On 28 October, 1915, W. H. Stone, Jr., and wife (and L. J. Duffy, who had a contract from Stone to convey to him) joined in a deed to the plaintiff, W. D. Meyer, recorded in Book 272, p. 597. In this deed is the following: "Together with a perpetual easement and right of way over, along and upon an alley at the rear of the Hotel Benbow property in the city of Greensboro, N. C., approximately ten feet wide, running along the old Lindsay line to Waddell's south line, and opening in Sycamore Street, for the purposes of ingress, egress and regress with wagons, buggies and other vehicles, and for other purposes of ingress and egress, and for a definite description of which see deed Benbow and wife to

W. H. Stone, Jr., recorded in office of register of deeds of Guilford County, in Book 245, page 547. There being hereby reserved for the benefit of the owners of the Benbow Hotel property, their heirs and assigns, an easement over, along and upon a ten-foot alley at the west end of the above-described land, and running along the old Lindsay line, for the purposes of ingress, egress and regress with wagons, buggies and other vehicles, it being the easement referred to in the deed from S. B. Adams and wife *et al.* to W. H. Stone, Jr., recorded in the office of register of deeds of Guilford County in Book 245 at page 542(7), *and subject to easement in deed of Stone to Reaves, Book 272, page 301.*" The easement conveyed to plaintiff was such as was acquired (1) under mesne conveyances from S. B. Adams and others to W. H. Stone, Jr.; (2) Benbow and wife to W. H. Stone, Jr., 10 July, 1913. This conveyance from W. H. Stone, Jr., to plaintiff, W. D. Meyer, was *subject to easement in deed from Stone to Reaves,* which is as follows: "And whereas, the property of the parties of the first part (W. H. Stone, Jr.) extends back to the property of the party of the second part (W. Perry Reaves); and whereas there is at present upon, over and through the back end of the property of the parties of the first part a ten-foot alley abutting part of the lot of the party of the second part hereinbefore described, said alley running over the property of certain other parties and *out to Sycamore Street;* and, whereas, the party of the second part is preparing to erect a building on his said lot hereinbefore described, and is desirous of securing a right of way and easement over, under and along said alley, and is especially desirous that said alley should never be closed or built upon or over in any way so as to interfere or obstruct the light of the party of the second part: Now, therefore, in consideration of the premises and the sum of $150 paid by the party of the second part, the receipt of which is hereby acknowledged, the said parties of the first part hereby *grant and convey to the said party of the second part, his heirs and assigns, a perpetual right of way and easement over, under and along the said alley leading out to Sycamore Street, as aforesaid, and the said parties of the first part hereby contract and agree for themselves, their heirs and assigns, that they will never obstruct or build over said alley in any way, the parties hereof being to leave unobstructed and clear the light and air space of ten feet for the benefit of the party of the second part and his heirs and assigns, and the party of the second part for the consideration aforesaid agrees on his part that he, in like manner, will not obstruct the light of the parties of the first part by any structure upon said alley.*"

It will be noted that the contract or deed of Stone to Reaves was dated *1 May, 1915,* and duly recorded on 30 June, 1915, Book 272,

p. 301. *On 29 October, 1915,* the deed was made from Stone to Meyer, the plaintiff, and in that deed is set forth the following: *"and subject to easement in deed of Stone to Reaves, Book 272, p. 301."*

This deed or contract gave to Reaves (1) what rights Stone obtained under the original deed to the ten-foot alley easement, from S. B. Adams *et al.,* through mesne conveyances to him; (2) and also what rights that Benbow could convey to Stone under deed or contract dated 10 July, 1913, recorded 11 July, 1913, Book 245, p. 547. When W. D. Meyer bought of W. H. Stone, Jr., Lot 2, he had actual and record notice of defendant's rights in the alley and how claimed, and took Lot 2 subject to the easement by express terms—"a perpetual right of way and easement over, under and along the said alley leading out to Sycamore Street."

On 30 October, 1917, E. P. Wharton deeded Lot 1 to plaintiff, W. D. Meyer, that he acquired through mesne conveyances from Benbow to Hole. In this deed the same language is used as to alleyway rights as used in deed from Benbow to Hole and the mesne conveyances substantially the same.

This action was instituted 4 November, 1925, some eight years after the deed to Lot 1 from Wharton to plaintiff. The interesting question as to what interest the original owner, C. D. Benbow had, by the language used in the deeds in reference to the ten-foot alley easement that he could convey to Stone, we think immaterial on this record. To be sure, the Reaves property was never a part of the Benbow property, and Reaves claims under title from other than Benbow as to the fee simple in the land, but his claim to go over the ten-foot alley easement, so far as plaintiff is concerned, is by way of estoppel. Plaintiff purchased Lot 2 with full notice of defendant's right to go over the alley from Lot 2 to West Sycamore Street and subject to that easement. He purchased Lot 1 after he had purchased Lot 2, with full recognition that he had made when he purchased Lot 2 that Reaves had a right over the alley. He also had actual and record notice of the deed or contract from Benbow, the original owner, to Stone conveying what rights he had in the alley which under conveyance to defendant enured to his benefit. Whatever right Benbow had by the language in his deeds, to convey an easement to Stone, was done after he had conveyed all his property and the fee in the alley to the Lindsay (afterwards Reaves) line. It is not disputed that plaintiff took his deed to Lot 1 with actual and record notice of a claim of right by Reaves to the easement. Plaintiff for some eight years, according to the record, recognized the rights of defendant to ingress and egress to the ten-foot alley easement opening into West Sycamore Street.

The principle as set forth by plaintiff, as follows, does not apply here: In Jones on Easements (ed. 1898), secs. 28 and 360, the doctrine is stated as follows: "Sec. 28. An appurtenant easement cannot be conveyed by the party entitled to it separate from the land in which it is appurtenant. It can be conveyed only by a conveyance of such land. It adheres in the land and cannot exist separate from it. It cannot be converted into an easement in gross." "Sec. 360: One having a right of way appurtenant to certain land cannot use it for the benefit of other land to which the right is not attached, although such other land is within the same inclosure with that to which the easement belongs. Except for this rule the burden upon the servient estate might be increased at the pleasure of the owner of the dominant estate. This rule is, therefore, applicable whether the way was created by grant, reservation, prescription, or as a way of necessity. In either case the way is created by grant, either express, presumed, or implied. The way is granted for the benefit of the particular land, and its use is limited to such land. Its use cannot be extended to other land, nor can the way be converted into a public way without the consent of the owner of the servient estate." *Wood v. Woodley,* 160 N. C., at p. 19; *Hales v. R. R.,* 172 N. C., 104; Mordecai's Law Lectures, 2 ed., p. 469. The principle of "increasing the servitude" does not apply, but that of estoppel does.

"Where a recital is intended to be an agreement of both parties to admit a fact, it estops both parties." Bigelow on Estoppel, 6 ed., p. 401; *Fort v. Allen,* 110 N. C., p. 183; *Hardy v. Abdallah,* 192 N. C., p. 45.

Plaintiff then took deed to Lot 2 under a distinct clear agreement that it was subject to an easement that defendant had ingress and egress over the ten-foot alley opening into West Sycamore Street. When he purchased Lot 1 he had already recognized and agreed that defendant had a ten-foot alley easement to West Sycamore Street; therefore, by his solemn agreement, he is estopped to deny the fact.

"Where a person has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim, title, or right, he cannot afterwards assume a position inconsistent with such act, claim, or conduct to the prejudice of another." 16 Cyc., p. 785; *Holloman v. R. R.,* 172 N. C., 376; *Cook v. Sink,* 190 N. C., at p. 626. See *Freeman v. Ramsay,* 189 N. C., 790; 21 C. J., p. 1202.

Although as to Lot 1 there may be no privity or privy in title, yet plaintiff, as to Lot 2, took it subject to clear recital and agreement that defendant had right of contract, called easement, that affected Lot 1, and he purchased Lot 1 with full knowledge of all the facts and had

agreed to the use of the alley by Reaves before he purchased Lot 1. In good conscience, in law and equity, he is not now permitted to repudiate his accepted agreement as to the use of the alley over Lot 1 and take a position prejudicial to the rights of defendant. As to Lots 1 and 2, plaintiff is estopped to make this claim.

For the reasons given, the judgment is

Reversed.

B. R. LACY, TREASURER OF THE STATE OF NORTH CAROLINA, v. HARTFORD ACCIDENT AND INDEMNITY COMPANY AND NATIONAL SURETY COMPANY.

(Filed 26 January, 1927.)

1. Bailment—Contracts—Insurer.

By special contract between the bailor and bailee, the liability of the latter may be enlarged to that of insurer, and he may be held responsible for cotton stored by it in its warehouse as bailee, and stolen therefrom.

2. Same—Warehouseman—Negligence.

Where under a contract of bailment the bailee receives certain bales of cotton and stores them in his warehouse, under agreement to return the identical bales upon return of the warehouse receipts in the manner provided in the contract, the liability of the bailee is that of insurer, and it is liable in damages when it is prevented by theft from performing its contract, though without negligence on its part.

3. Same—Statutes—Cotton Warehouses—State Treasurer.

Under the provisions of the statute to provide improved marketing facilities for cotton, C. S., 4907 *et seq.*, and the rules and regulations made by the State Board of Agriculture in pursuance thereof, 3 C. S., 4925(b), and the warehouse receipts, made negotiable by statute, etc., C. S., 4925(k), the warehouseman's liability to the State after it has paid the bailor for his stolen cotton, or the one entitled by the proper transfer of the certificate, is not dependent upon the exercise of due care by the warehouseman, or the absence of negligence by its employees or agents, for within the intent and meaning of the statute the liability of the warehouseman is that of insurer.

APPEAL by plaintiff from *Barnhill, J.*, at third April Term, 1926, of WAKE. New trial.

At the session of 1919 the General Assembly enacted a law entitled, "An act to provide improved marketing facilities for cotton" (Public Laws 1919, ch. 168; C. S., 4907 *et seq.*), and in 1921 passed an act under the same title enlarging the former act and providing in section 21, "Chapter 168 of the Public Laws of one thousand nine hundred and nineteen, and all other laws and clauses of laws in so far only as they

conflict with the provisions of this act are hereby repealed." Public Laws 1921, ch. 137; 3 C. S., 4925a and 4925u. Pursuant to this act a warehouse was organized in the town of Benson, in Johnston County, and bonded as a warehouse under the North Carolina State Warehouse System, with Simon P. Honeycutt as local manager or warehouseman. On 1 September, 1923, Honeycutt, in compliance with the act and the rules and regulations authorized and adopted thereunder executed his bond in the sum of $6,000 with the defendant National Surety Company as surety, and on 10 November, 1923, executed a similar bond in the sum of $4,000, with the defendant Hartford Accident and Indemnity Company, as surety. The condition of each bond was as follows: "Now, therefore, if the said principal shall faithfully perform all his obligations as a warehouseman under said act, and such additional obligations as a warehouseman arising during the period of such license, or any renewal thereof, as may be assumed by him under contracts with the respective depositors of cotton in such warehouse, then this obligation shall be null and void and of no effect; otherwise to be and remain in full force and virtue."

On 3 November, 1923, the North Carolina Cotton Growers Coöperative Association of Raleigh deposited with Honeycutt, the local manager, fifty-six bales of cotton, and Charles Johnson & Brother, of Benson, one bale, all which were received by Honeycutt and stored in the Benson Cotton Warehouse. Receipts or certificates were issued to the depositors in accordance with the provisions of the act. Some time thereafter these depositors, being ready, able, and willing to pay all charges, liabilities and liens due the local manager or the warehouseman and to surrender the receipts or certificates, demanded delivery of the cotton deposited by them and the local manager or warehouseman failed to return the cotton to the depositors or to either of them. The depositors then made demand upon the plaintiff, and he paid to the North Carolina Cotton Growers Coöperative Association $7,966.46, and to Charles Johnson & Brother $158.93, in consequence of the failure of the local manager or warehouseman to return the cotton which they had deposited in the warehouse at Benson.

The defendants alleged in their further defense that the cotton had been lost or destroyed, but not by any act, neglect, or default of the local manager or of the warehouse, but notwithstanding the exercise of due care the local manager was not able to make delivery of the cotton and could not be held to respond in damages.

The verdict and judgment were as follows:

This cause coming on to be heard and being heard before his Honor, M. V. Barnhill, judge, and jury, at the Third April Term, 1926, of this court, issues were submitted to and answered by the jury as follows:

1. Were the fifty-seven bales of cotton delivered to the warehouse under contract of the North Carolina and United States Warehouse Act and regulation for cotton warehouses thereunder and receipts issued therefor? Answer: Yes.

2. If so, did said Warehouse Company fail to redeliver said cotton upon tender of said receipts and payment of charges, etc.? Answer: Yes.

3. Was the failure of said Warehouse Company to redeliver cotton due to causes other than default or neglect on the part of said warehouseman, S. P. Honeycutt? Answer: Yes.

4. Was the failure of said Warehouse Company to redeliver said cotton caused by breach by Honeycutt of any of the terms of said warehousing act or regulations adopted thereunder or the terms of said contract as embraced within said receipts? Answer: No.

It is thereupon considered, ordered and adjudged that plaintiff recover nothing of the defendants in this action, and that defendants go without day and recover of the plaintiff their costs to be taxed by the clerk of this court.

The plaintiff excepted and appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash and I. M. Bailey for plaintiff.

S. Brown Shepherd and Ruark & Fletcher for defendants.

ADAMS, J. It is insisted by the defendants that the relation existing between the owners of the cotton and the warehouseman was that of bailor and bailee, and that there is not sufficient evidence to subject the warehouseman's bond to liability for loss of the bales which were received and stored. The circumstances tend to show that the cotton was stolen—the defendants say without any default or neglect of the local manager and without any act subjecting them to liability in damages; and according to the verdict the warehouseman's failure to deliver the cotton upon demand of the owners was not due to his neglect or default. The plaintiff contends that the warehouseman by virtue of a special contract became liable as an insurer; that the first and second issues should determine the controversy; and not only that the third and fourth were unnecessary, but that the instruction in reference to them is not free from error. In our opinion the larceny or loss of the cotton does not relieve the warehouseman's bond of liability.

In *Hanes v. Shapiro,* 168 N. C., 24, 29, it is said: "In all ordinary classes of bailment losses occurring without negligence on the part of the bailee fall upon the bailor. The bailee's liability turns upon the presence or absence of negligence. In some exceptional kinds of bailments, as in case of carriers or innkeepers, there is a special liability,

approximating that of an insurer, but, generally speaking, there can be no recovery against a bailee for loss or damage to the property, in the absence of negligence." But the responsibility usually imposed by the law upon a bailee may be enlarged or diminished by special agreement. By express contract he may make himself an insurer; and as a rule he does this when he binds himself in a penal bond to perform the duties of his office without exception. "There is an established difference between a duty created merely by law and one to which is added the obligation of an express undertaking. The law does not compel to impossibilities; but it is a settled rule that if performance of an express engagement becomes impossible by reason of anything occurring after the contract was made, though unforeseen by the contracting party, and not within his control, he will not be excused." *Boyden v. U. S.,* 13 Wallace, 17, 20 Law Ed., 527.

The principle is approved in our own decisions. In *Robertson v. Lumber Co.,* 165 N. C., 4, the defendant hired the plaintiff's boat and agreed to keep it in good repair and return it in good condition. An employee of the defendant ran the boat over an obstruction in the river and damaged it; and with respect to the defendant's liability *Brown, J.,* said: "This is sufficient evidence of negligence, even if it is necessary to prove negligence. But under the contract as testified to by Hopkins, it is only necessary to prove a breach of the contract, viz., that the boat was not kept in good repair nor returned in good condition." True, in this case there was an affirmative answer to the issue of negligence, and this is referred to in *Sawyer v. Wilkinson,* 166 N. C., 497. Nevertheless the binding force of a special contract is there recognized and indeed is stressed later in the case of *Cooke v. Veneer Co.,* 169 N. C., 493. In the latter case the Court remarked: "The parties may, however, substitute a special contract for the contract implied in law. In such cases the express agreement determines the rights and liabilities arising from the bailment. The bailee may be relieved of all liability, or he may become an insurer. A bailee may thus become liable, irrespective of negligence or fraud for a breach of the bailment contract. . . . It is stated in the record that the "defendant agreed to redeliver the barge in as good condition as when received, ordinary wear and tear excepted." Under such contract the defendant is liable for the return of the barge in as good condition as when received, unless prevented by the act of God or the King's enemy." See, also, *Bell v. Bowen,* 46 N. C., 316; *Martin v. Cuthbertson,* 64 N. C., 328; *Austin v. Miller,* 74 N. C., 274; *Clark v. Whitehurst,* 171 N. C., 1.

The immediate question, then, is this: Does the record disclose a special contract which enlarges the responsibility of the warehouseman beyond the principles usually applied to the bailment relation?

The purpose of the statutes should be clearly understood. One object is to give the cotton crop the standing to which it is entitled "as collateral in the commercial world." C. S., 4925(a). In administering the statutory provisions the board of agriculture is empowered to make and enforce such rules and regulations as may be necessary to make effective the purpose of the law and to prescribe reasonable charges for storage. Sec. 4925(b). Bonds are required of the superintendent and employees; and to provide an indemnifying fund to cover any loss not covered by the bonds and to provide for making the warehouse receipt universally acceptable as collateral, on each bale of cotton ginned in North Carolina during a specified time twenty-five cents to be collected by the ginner was to be paid into the State treasury. Secs. 4925(d) and 4925(e). It is important to note in this connection that the tax to provide an indemnifying fund is not the primary source from which any default is to be made good. The tax is intended to cover any loss not covered by the bonds, thus constituting the bonds, as was said by *Justice Hoke,* "the primary fund from which to make good the default of their respective principals." *Lacy v. Indemnity Co.,* 189 N. C., 24, 33. Any person owning cotton may store it and receive all the benefits accruing from State management; and when the owner stores it the local manager shall, if not previously done, have it graded and stapled. For cotton thus stored an official negotiable receipt, of the form and design approved by the board of agriculture, shall be issued under the seal and in the name of the State of North Carolina, upon the surrender of which the warehouseman shall deliver the identical cotton for which the receipt is given. Secs. 4925(i) and 4925(k). These receipts are transferable by written assignment and actual delivery and the cotton which they represent is to be deliverable only when they are physically presented for cancellation. Each official negotiable receipt carries the absolute title to the cotton it represents. Sec. 4925(l). The superintendent shall insure, or shall require the local manager to insure, and to keep insured for its full value all cotton on storage, and shall aid and assist the owner to secure and negotiate loans upon the receipts issued. Secs. 4925(q), 4925(r).

Complying with section 4925(b), the board of agriculture made and promulgated certain rules and regulations governing the administration of the warehouse system, announcing as one of the benefits that cotton stored in warehouses licensed under the State system should be fully protected at all times from loss by fire or theft, and providing in the original negotiable warehouse receipt that upon the return of the receipt properly endorsed and the payment of all charges and liabilities due the local manager, the cotton for which it was issued should be returned to the depositor or his order, the State guaranteeing the integ-

rity of the receipt. The obligation of the bond extends to and includes contracts which may be made by the warehouseman with those who store their cotton; and the express agreement in the receipt to return the cotton evidently refers to the "identical cotton" mentioned in section 4925(k). While not inadvertent to the general rule stated above that a mere promise to return the cotton would not indicate an intention to enlarge the ordinary liability of a warehouseman as bailee, we are convinced that the act of 1921 (3 C. S., 4925(a) *et seq.*), together with the bond, the receipt, and the rules and regulations which are made a part of the record, and which the appellees say is a part of the act, was intended to make the warehouse receipt, not only negotiable, but in the words of the statute, "universally acceptable as collateral." Sec. 4925(e). Manifestly the Legislature did not intend that this object should be defeated, or that the guaranty of the State should incur the hazard of loss, by holding the warehouseman to a rule of liability no more exacting than that of exercising due care. The special contract enlarged the responsibility of the warehouseman beyond the rule which usually prevails in the law of bailment. The act of 1921 contemplates the operation of a warehouse system without profit or loss by the State and emphasizes the necessity of insuring the security of the system "beyond any reasonable possibility of loss." Sec. 4925(p); *Lacy v. Indemnity Co., supra.*

We are referred by the appellees to the United States Warehouse Act, particularly to section 21, which provides that the warehouseman shall deliver the stored product upon demand made by the holder of the receipt "in the absence of such lawful excuse." It is only necessary to cite section 29: "Nothing in this act shall be construed to conflict with, or to authorize any conflict with, or in any way to impair or limit the effect or operation of the laws of any State relating to warehouses." U. S. Compiled Statutes, 1918, sec. 8747¾jj; *ibid.*, 1925, sec. 8747¾mm. We are likewise referred to C. S., 4048 and 4061, providing respectively that the warehouseman must deliver the goods "in the absence of some lawful excuse provided in this act," and that he shall be liable for any loss or injury to the goods caused by his failure to use reasonable care; but these sections are a part of the law applicable to warehouses generally under the law of bailment, and these restrictive clauses were no doubt purposely omitted from the act of 1921, which repealed all conflicting laws and clauses.

We think the defendants are liable as insurers, and upon this theory the case should be tried and determined.

New trial.

R. J. HOLLOWAY, ADMINISTRATOR OF WATTS HOLLOWAY, v. A. ELSIE MOSER.

(Filed 26 January, 1927.)

1. Escape—Convicts—Guards—Misdemeanors.

The guard has no authority to kill one convicted of a misdemeanor while fleeing to escape, without his offering resistance or showing any menace or show of force in doing so, or doing anything that would suggest danger to the person of the guard.

2. Same—Actions—Civil Liability.

A civil action will lie to recover damages of a guard for unlawfully killing a convict under his charge convicted of a misdemeanor, while the deceased was endeavoring to escape. C. S., 160.

3. Same—Statutes—Felons—Misdemeanors—Common Law.

The provisions of C. S., 7745, relate to the authority of a convict guard in preventing the escape of those under his control, who are convicted of a felony justifying the guard in using any means necessary to prevent an escape even to the taking of human life, under justifiable circumstances, and does not apply when the one attempting to escape has been only convicted of a misdemeanor, the common law applying in such instances.

4. Criminal Law—Statutes—Misdemeanors—Common Law—Declaratory Statutes.

The offense of breaking prison after being lawfully confined, C. S., 4404, making it a misdemeanor, is in case of imprisonment for a misdemeanor, and is declaratory of the common law.

5. Convicts—Felons—Misdemeanants—Clothing—Escape.

One of the intentions of the Legislature in enacting C. S., 7730, 7731, requiring a distinct difference in dress between those convicted of a felony and misdmeanants, was to apprise the guard over them of this difference, and where the guard has unlawfully killed one in the latter class while endeavoring to escape, he may not avoid the consequences of his act upon the ground that he could not tell for which offense the prisoner had been sentenced.

APPEAL by plaintiff from *Oglesby, J.*, at September Term, 1926, of FORSYTH.

Civil action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect or default of the defendant.

On motion of the defendant, made at the close of plaintiff's evidence, judgment was entered as in case of nonsuit, from which the plaintiff appeals, assigning error.

J. F. Jordan and F. B. Hendren for plaintiff.
Swink, Clement, Hutchins & Feimster for defendant.

STACY, C. J. The facts are these: On 1 June, 1925, plaintiff's intestate, Watts Holloway, was tried in the recorder's court of the city of Winston-Salem, convicted of carrying a concealed weapon in violation of law, and sentenced, under a special statute, to six months on the county roads of Forsyth County. He was assigned to Camp No. 1, over which the defendant was superintendent and guard. The defendant was also a deputy sheriff of the county. Two days thereafter, on 3 June, while working one of the roads of the county, the defendant ordered the guards in charge to take the force of convicts, about forty in number, including plaintiff's intestate, to a place of safety until a blast of dynamite could be discharged. On returning to their work, following the explosion of the dynamite, Watts Holloway attempted to escape by running across the field and into a thicket about one hundred yards away. One of the guards, F. M. Reid, called three or four times to the plaintiff's intestate to halt, and shot at him as he ran away, but missed him. The defendant thereupon ran out by the side of the road, called to plaintiff's intestate to halt, which he failed to do, and just as he was entering the thicket, running at full speed, the defendant shot him in the back and killed him almost instantly. The father of the deceased brings this action as administrator to recover of the superintendent and guard of the convict camp damages for the death of his son, which he alleges was caused by the wrongful act, neglect or default of the defendant. C. S., 160.

The only question presented by the appeal is whether plaintiff, under the evidence adduced, is entitled to have his case submitted to the jury. We think he is. *Suell v. Derricott,* 161 Ala., 259, 23 L. R. A. (N. S.), 996.

Let it be observed at the outset that plaintiff's intestate was not a felon, nor was he offering forcible resistance to the guards or undertaking to escape by overpowering them. He was a misdemeanant attempting to escape by flight, without endangering the life or limb of those who had him in lawful custody at the time.

It is provided by C. S., 7745, that when a convict, or several combined, shall offer violence to any officer, overseer or guard, or other convict, or attempt to do any injury to the building or workshops of the State prison, or shall attempt to escape, or shall resist or disobey any lawful command, the officer, overseer or guard shall use any means necessary to defend himself, to enforce the observance of discipline, to secure the person of the offender and to prevent an escape.

Under this enactment it is no doubt the law that a guard or overseer of penitentiary convicts would be justified in using any means necessary to prevent an escape, even to the taking of the convict's life, if need be. *Jackson v. State,* 76 Ga., 473; 30 C. J., 42. But this statute, we apprehend, was intended to apply only to the management of con-

victs who are felons, or who have been sentenced to the State prison—all of whom are felons, C. S., 4171—and has no application to the discipline of misdemeanants who have been sentenced to the county roads. We are therefore remitted to the common law, in the absence of any statute covering the subject, for guidance in ascertaining the rights and liabilities of the parties under circumstances such as those disclosed by the present record.

By the common law an officer, in a case of felony, was permitted to use all force necessary to capture the felon, even to slaying him when in flight. In the case of a misdemeanor, however, the rule was different. The officer could defend himself, if resisted, even to the taking of life, but if the offender were simply fleeing and not resisting, he had no right to kill. It was thought that to permit the life of one charged with a mere misdemeanor to be taken, when not resisting, but only fleeing, would, aside from its inhumanity, be productive of more evil than good.

The reason for the distinction is obvious. Ordinarily, the security of person and property is not endangered by a misdemeanant being at large, while the safety and security of society require the speedy arrest and punishment of a felon.

Bishop says: "The justification of homicide happening in the arrest of persons charged with misdemeanors, or breaches of the peace, is subject to a different rule from that which we have been laying down in respect to cases of felony; for, generally speaking, in misdemeanors it will be murder to kill the party accused for flying from the arrest, though he cannot otherwise be overtaken, and though there be a warrant to apprehend him; but under circumstances, it may amount only to manslaughter, if it appear that death was not intended. . . .

"But in misdemeanors and breaches of the peace, as well as in cases of felony, if the officer meet with resistance and the offender is killed in the struggle, the killing will be justified." 2 Bishop on Criminal Law, secs. 662-3.

The same rule may be found in the works of the other common-law writers.

Hale in his Pleas of the Crown, p. 481, says: "If a gaoler be assaulted by his prisoner, or if the sheriff or his minister be assaulted in the execution of his office, he is not bound to give back to the wall; but if he kills the assailant, it is in law adjudged *se defendendo*, though he gives not back to the wall; the like of a constable or watchman, for they are ministers of justice, and under a more special protection in the execution of their office, than private persons.

"But if the prisoner makes no resistance, but flies, yet the officer, either for fear that he, or some other of his party will rescue the prisoner, strikes the prisoner, whereof he dies, this is murder, for here was

no assault first made by the prisoner, and so it cannot be *se defendendo* in the officer.

"And here is the difference between civil actions and felonies. If a man be in danger of arrest by a *capias* in debt or trespass, and he flies, and the bailiff kills him, it is murder; but if a felon flies, and he cannot be otherwise taken, if he be killed, it is no felony, and in that case the officer so killing forfeits nothing, but the person so assaulted and killed forfeits his goods."

It was suggested on the argument that a distinction should be made between a case where a person is attempting to avoid arrest, and where he is endeavoring to escape after arrest. If, however, the offender be in flight, and is offering no resistance to the officers at the time, then we apprehend the law to be the same whether he flee to avoid arrest or to escape from custody. Bishop on Criminal Law, sec. 664; Wharton on Homicide, secs. 212-214.

Forcible resistance to the execution of legal warrants, whether by felons or misdmeanants, is not allowed in this jurisdiction. As against those who defy its decrees and threaten violence to its officers, the law commands that its writs be executed, peaceably, if they can; forcibly, if they must. *S. v. Garrett,* 60 N. C., 144. An officer, in making an arrest or preventing an escape, either in case of felony or misdemeanor, may meet force with force, sufficient to overcome it, even to the taking of life, if necessary. *S. v. Dunning,* 177 N. C., 559. And he is not required, under such circumstances, to afford the accused equal opportunities with him in the struggle. He is rightfully the aggressor, and he may use such force as is necessary to overcome any resistance. He is not bound to put off the arrest until a more favorable time. *S. v. McMahan,* 103 N. C., 379; *S. v. Gosnell,* 74 Fed., 734. "His duty is to overcome all resistance, and bring the party to be arrested under physical restraint, and the means he may use must be coextensive with the duty, and so the law is written." *Black, J.,* in *S. v. Fuller,* 96 Mo., 165. If the offender put the life of the officer in jeopardy, the latter may *se defendendo* slay him; but he must be careful not to use any greater force than is reasonably and apparently necessary under the circumstances, for necessity is the ground upon which the law permits the taking of life in such cases. *Head v. Martin,* 85 Ky., 480. It has been said, however, that where officers of the law, engaged in making arrests, are acting in good faith, and force is required to be used, their conduct should not be weighed in golden scales. *S. v. Pugh,* 101 N. C., 737; *S. v. McNinch,* 90 N. C., 696.

Animadverting generally on the subject in *S. v. Bryant,* 65 N. C., 327, wherein the right of a private citizen to arrest a felon without a warrant was involved, *Reade, J.,* delivering the opinion of the Court, said:

"Extreme measures, therefore, which might be resorted to in capital felonies, would shock us if resorted to in inferior felonies. But, in any case where extreme measures are resorted to in making arrests, it must appear that they were *necessary,* and that the felon could not be otherwise taken. It should be noted, also, that the cases where extreme measures have been justified have usually been cases where the felon has actually *resisted.* No man would attempt to arrest a felon if he were not allowed the advantage of overcoming the resistance without subjecting himself to peril. He need not, therefore, engage with the felon on equal terms, but may overcome resistance with superior force, even to the extent of killing the felon if it be necessary. Yet it is said: 'It behooveth them to be very careful that they do not misbehave themselves in the discharge of their duty, for if they do, they may forfeit this special protection.' Foster, ch. 8, sec. 18, p. 319.

"In the quotation from Hale, *supra,* it is said that killing the felon may be justified if he 'resists or flies.' This would seem to put resistance and flight upon the same footing. But this must be understood with some modification. In case of resistance and conflict, the resistance must be overcome *then* and *there,* because, not only is the arrest of the felon involved, but the safety of him who is rightfully making the arrest. But ordinarily there is not the same urgency in case of flight; for, although he be not arrested then and there, yet he may be arrested at another time and place. So it would seem that, at any rate, there ought to be pursuit, or a certainty of escape, before killing could be justified; else how does it appear that he 'could not be otherwise arrested?'" See, also, in this connection, *S. v. Stancill,* 128 N. C., 610, and *S. v. Campbell,* 107 N. C., 953.

It is universally held that an officer has no right to kill one who merely flees to avoid arrest for a misdemeanor or to effect an escape from such arrest, even though it may appear that by no other means can the accused be taken or recaptured. 13 R. C. L., 875. It is better that he be permitted to escape altogether than that his life be forfeited, while unresisting, for such a trivial offense. *Caldwell v. State,* 41 Tex., 86. "The law values human life too highly to give an officer the right to proceed to the extremity of shooting one whom he is attempting to arrest for a violation of a municipal ordinance in order to prevent his escape, even though the offender cannot be taken otherwise." *Hill, C. J.,* in *Holmes v. State,* 5 Ga. App., 166, 62 S. E., 716.

There would seem to be no difference in principle between the duty of an officer, and the means he may employ, to hold a misdemeanant, after arrest and before conviction, and the duty of a guard to prevent his escape after he has been convicted and committed to his custody. *Reneau v. State,* 2 Lea (Tenn.), 720, 31 Am. Rep., 626; *U. S. v. Clark,*

31 Fed., 710; *Thomas v. Kinkead,* 55 Ark., 502, 15 L. R. A., 558; *S. v. Turlington,* 102 Mo., 642; 2 Brill's Cyclopedia Crim. Law, sec. 692.

True, in *S. v. Sigman,* 106 N. C., 728, it was said: "After an accused person has been arrested, an officer is justified in using the amount of force necessary to detain him in custody, and he may kill his prisoner to prevent his escape; provided, it becomes necessary (1 Bishop Cr. Pr., sec. 618), whether he be charged with a felony or a misdemeanor." But this language, it should be remembered, was used in reference to a case where one under arrest makes forcible effort to free himself. In the case then before the Court the prisoner sought to be apprehended by the officers had entirely escaped, and was fleeing to avoid arrest, when one of the officers, being unable to overtake him, fired at the accused. This was held to be an unlawful assault on the part of the officer. Hence, there was no occasion for deciding whether the shooting would have been justified if it had been done in an effort to prevent an escape by flight. Indeed, in the very same case it was also said: "But a very different principle prevails where a party charged with a misdemeanor flees from an officer, who is entrusted with a criminal warrant, or *capias,* in order to avoid arrest. The accused is shielded in that event, even from an attempt to kill with a gun or pistol, by the merciful rule which forbids the risk of human life or the shedding of blood in order to bring to justice one who is charged with so trivial an offense, when it is probable that he can be arrested another day and held to answer." Similar rulings were approved in *S. v. Dunning,* 177 N. C., 559; *Sossamon v. Cruse,* 133 N. C., 470; *S. v. Stancill,* 128 N. C., 606; *S. v. Pugh,* 101 N. C., 737; *S. v. McNinch,* 90 N. C., 695; *S. v. Bryant,* 65 N. C., 327, and *S. v. Stalcup,* 24 N. C., 50. See, also, *S. v. Finch,* 177 N. C., 599, for a valuable discussion of these principles.

In *Reneau v. State,* 2 Lea (Tenn.), 720, the facts were that one Vineyard Thomas was committed to jail for failure to pay a fine and cost in assault and battery, a misdemeanor, and in the execution of a *mittimus,* issued by the justice of the peace for the purpose, Reneau, a constable, started with Thomas to the county jail, accompanied by another as guard. On the route Thomas started to run and make his escape. Neither officer pursued, but after commanding him three times to halt, and not being obeyed, Reneau fired two shots at Thomas, one of which took effect, killing him almost instantly. The officer was tried and convicted of an unlawful homicide, manslaughter, and this was affirmed on appeal.

Speaking to the subject in *Brown v. Weaver,* 76 Miss., 7, *Whitfield, J.,* says: "In Mr. Bishop's new Criminal Law (8th ed., sec. 647, par. 3, note 1), Mr. Bishop cites *Jackson v. State,* 76 Ga., 473, to the proposition that 'after an arrest, whether for felony or misdemeanor, or

during an imprisonment, the life of the prisoner may be taken, if necessary to prevent the escape.' That was the case of a guard killing a convict in the penitentiary, who, he supposed, was trying to escape. It supports the proposition that an officer may kill a convicted felon trying to escape from imprisonment for felony, but it furnishes no support to the doctrine that an officer may kill a misdemeanant who is merely effecting his escape after arrest, or from imprisonment for mere misdemeanor, by simply running away. If Mr. Bishop means merely to say that when a misdemeanant, after arrest, tries to 'break away,' violently resisting or assaulting the officer, the officer may kill him, as in self-defense, to prevent the infliction of a felony upon himself, the doctrine is sound, and not in conflict with the cases he criticizes. But if he means to say, as we understand him, that an officer may kill a misdemeanant whom he has arrested, and who eludes the officer, and gets away from him without resisting the officer, and without employing any force, while such misdemeanant is effecting his escape merely by running away, then such doctrine is not sound, in our judgment, and is unsupported by the authorities. 3 Russell on Crimes (6 ed.), p. 132, *Holroyd, J.*, saying: 'An officer must not kill for an escape, where the party is in custody for a misdemeanor.' McLain, in his Criminal Law (1897), sec. 298, approves *Reneau v. State, supra,* criticized by Mr. Bishop, and lays down the doctrine we have announced, and points out the very distinction we have just above drawn, as being the only ground of support for Mr. Bishop's doctrine, saying: 'It is probable, however, that even as to preventing escape, the officer is justified in taking life only to prevent escape for felony, or where, the offense being a misdemeanor, in resisting force with force, his own life is put in peril, and not where he takes life merely to prevent escape of one charged with a misdemeanor.' Substituting for 'where his own life is put in peril,' 'where, in killing, he does so to save his own life, or prevent the infliction of a felony upon himself,' this is the sound doctrine."

It is provided by C. S., 4404, that if any person shall break prison, being lawfully confined therein, or shall escape from the custody of any superintendent, guard or officer, he shall be guilty of a misdemeanor. This, it appears, is only declaratory of the common law, so far as misdemeanants are concerned, and has the effect, as held in *S. v. Brown,* 82 N. C., 585, of reducing the common-law felony of prison-breaking to a misdemeanor.

As we have seen, at the common law, with its regard for human life, an officer attempting to arrest an offender for a misdemeanor, or to prevent his escape after arrest, was not permitted to kill when the accused was simply fleeing. And it is not believed that the law in this respect has lost any of its humanity. We have found no expression of

the law-making body in this State which would seem to make it more rigorous or to restrain its mercy. C. S., 4393, was not intended to have such effect. Certainly, without legislative authority, the severity of a remote age ought not to be exceeded in dealing with those convicted only of small offenses.

The suggestion that the defendant could not tell whether plaintiff's intestate was a felon or a misdemeanant, and that he acted in good faith, thinking that he had a right to shoot, cannot excuse him, if, in fact, he had no such right under the law. *Campbell v. People,* 55 Col., 302, 133 Pac., 1043. It was no fault of plaintiff's intestate that the defendant failed to observe the class of criminals to which he belonged. By C. S., 7730, it is made the duty of the several judicial officers of the State, in assigning any person to work the public roads of any county, to designate in each judgment that such as may be convicted of a felony shall wear felon's stripes, and such as are convicted of a misdemeanor shall not wear felon stripes. And by C. S., 7731, it is made unlawful for any superintendent of convicts, or other person in authority, to work persons convicted of a felony in other than the uniform of a felon, or to clothe a person convicted of a misdemeanor in the uniform of a felon. No doubt, one of the purposes of the Legislature in enacting these statutes, and requiring that felons and misdemeanants be dressed differently, was to enable those having them in charge to distinguish at a glance the class to which each belongs. Such measures should be employed to secure misdemeanants, assigned to work on the public roads, as will enable the guards to hold them in custody without resorting to unlawful means.

There was error in entering judgment as of nonsuit. This will be reversed and the cause remanded for trial before a jury.

Reversed.

STATE v. L. E. REVIS.

(Filed 26 January, 1927.)

1. Statutes—State Policy—Convicts—Punishment—Constitutional Law.

The policy of the State involving the power of the Legislature to authorize corporal punishment to be administered to refractory or unruly convicts sentenced to work on the county roads, is for the Legislature to determine, and whether there is any constitutional restraint thereon, is a matter for the courts to decide.

2. Constitutional Law—Convicts—Corporal Punishment—Statutes.

Where a public-local law provides for whipping to be administered to convicts sentenced to work upon the roads as an extreme necessary

means to enforce discipline, safeguarded in respect to its being humanely administered after due notice to the offender, under proper rules and regulations, with report to the commissioners of the county to which the local law applies, making it a misdemeanor for the one designated to do so brutally or without mercy: *Held,* the statute is not inhibited by any provision of our Constitution and is a valid enactment. C. S., 7723, 7728; Constitution, Art. XI, sec. 1.

APPEAL by defendant from judgment rendered on a special verdict by *Stack, J.,* at August Term, 1926, of BUNCOMBE.

Criminal prosecution tried upon an indictment charging the defendant with an assault upon one Lee Cody, 16 August, 1926.

It was shown on the trial:

1. That the defendant is now, and has been for the past six years, superintendent of the prison camps of Buncombe County.

2. That all prisoners confined in the prison barracks or prison camps of said county are divided into three classes, based on their conduct, as follows:

"Class A. Shall include all those prisoners who have given evidence that they will, or who it is believed will observe the rules and regulations and work diligently and are likely to maintain themselves by honest industry after their discharge.

"Class B. Shall include those prisoners who have not as yet given evidence that they can be trusted, but are competent to work and are reasonably obedient to the rules and regulations of the institution.

"Class C. Shall include those prisoners who have demonstrated that they are incorrigible, have no respect for the rules and regulations and seriously interfere with the discipline and effectiveness of the labor of the other prisoners."

This classification is identical with that set out in C. S., 7723, for the governance of penitentiary convicts.

As a reward for good behavior, prisoners are entitled to be promoted from a lower to a higher class with progressively larger freedom; and, as evidence of demerit for bad conduct, they are subject to demission from a higher to a lower class.

3. That only convicts assigned to "Class C," under the above rules, are subject to corporal punishment as provided by chapter 328, Public-Local Laws 1923, and only then after all other means of discipline have failed of proper results.

4. That Lee Cody was convicted of highway robbery, assault, and prison breach, sentenced to the common jail of Buncombe County for a term of twelve months and assigned to work upon the public roads of said county, and on 22 March, 1926, was sent to the prison camp of which the defendant is superintendent.

5. That on or about 1 July, 1926, the said convict, who was strong and able-bodied, well and capable of working, having previously been assigned to "Class C," as above designated, became mutinous and unruly, refused to work or labor as he was required to do, refused to obey orders of the guards (used obscene language in the hearing of women travelers on the highway), declined to observe the prison rules, and contended that the superintendent had no right to whip him or to discipline him for his misconduct.

6. That the rules of the camp, adopted and promulgated by the county board of commissioners, under authority of and agreeable with the provisions of the statute, were well known to the recalcitrant prisoner, and he was duly warned of the results to follow if he continued to persist in his course of mischievous wrongdoing.

7. That after all other means of discipline had failed, it being apparent that the prisoner, by his unruliness, was determined to test the right of the defendant to whip him, thereby rendering it necessary to do so in order to maintain authority in the camp, the defendant, in strict conformity with the provisions of the statute and the rules adopted in pursuance thereof, proceeded to whip the prisoner privately, in the presence of two persons of good moral character, with a leather strap two feet in length, two inches wide and one-eighth of an inch thick, striking the prisoner, who was dressed in his prison clothes, six licks across his back and hips.

8. That the whipping so administered was not done in a cruel or unmerciful manner.

9. That the superintendent made and kept a record of the offenses for which the prisoner was whipped, the number of blows inflicted, the names of the witnesses present, and reported the same, within ten days thereafter, to the board of commissioners of the county for preservation as a public record and to be kept open to public inspection, as required by the statute.

Upon the facts found and declared by the jury, a special verdict of guilty was rendered under appropriate instructions from the court, not because the whipping was cruel or unmerciful, but for the reason that, in the opinion of the presiding judge, all corporal punishment of convicts is illegal, even when administered under statutory authority and in strict compliance therewith. From the judgment entered on the verdict, the defendant appeals, assigning error. C. S., 4649.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. W. Haynes and Mark W. Brown for defendant.

STACY, C. J., after stating the case: The immediate question presented is whether the Legislature has the power to authorize the whipping of convicts as a necessary means of discipline in the management of able-bodied men convicted of crime and assigned to work on the public roads of Buncombe County. In its ultimate effect, the case involves the power of the Legislature to deal, in a similar manner, with the management of incorrigible and unruly convicts throughout the State. The constitutionality of sections 8 and 9 of chapter 328, Public-Local Laws 1923, is the only point raised by the appeal.

Let it be observed in the outset that the question for decision is not one of wisdom or policy, but one of power. The Legislature alone may determine the policy of the State, and its will is supreme, except where limited by constitutional inhibition, which exception or limitation, when invoked, presents a question of power for the courts to decide. *Marbury v. Madison,* 1 Cranch, 137. But even then the courts do not undertake to say what the law ought to be; they only declare what it is. *Wood v. Braswell,* 192 N. C., 588. To interpret, expound, or declare what the law is or has been, and to adjudicate the rights of litigants are judicial powers; to say what the law shall be is "legislative." *Chisholm v. Georgia,* 2 Dall., 432; *Kilbourn v. Thompson,* 103 U. S., 192.

This results necessarily from the character of the structure which has been ordained and established by the people for the government of the State. Every student knows that, in North Carolina, those who make the laws determine their expediency and wisdom, but they do not administer them. The chief magistrate, who executes them, is not allowed to judge them. To another tribunal, the judiciary, is given the authority to pass upon their constitutional validity, "to the end that it be a government of laws and not of men." *Long v. Watts,* 183 N. C., 99.

It can make no difference whether the judges, as individuals, think ill or well of the manner in which the Legislature has dealt with a given subject, for, so long as the law-making body stays within the bounds of the Constitution, its acts are free from judicial interference. *Muskrat v. U. S.,* 219 U. S., 346. It is only when the General Assembly undertakes to exceed the grant of legislative authority, made to it in the organic law, that the courts are directed to restrain its action. *S. v. Lewis,* 142 N. C., 626. Such is one of the functions of the judiciary under a constitutional form of government like ours, but it can go no further in this respect. *Person v. Doughton,* 186 N. C., p. 725.

Speaking to the question in *S. v. Burnett,* 179 N. C., 735, *Hoke, J.,* said: "It is the accepted position in this State that our Constitution in vesting the General Assembly with legislative authority, conferred and intended to confer upon that body all the 'legislative powers of the English Parliament or other government of a free people,' except where

restrained by express constitutional provision or necessary implication therefrom," citing *Thomas v. Sanderlin,* 173 N. C., 329, *S. v. Lewis,* 142 N. C., 626, Black Constitutional Law (3 ed.), sec. 351, as authorities in support of the position.

The courts are limited to the exercise of judicial power by the same instrument which limits the Legislature to a given field of operation. *R. R. v. Cherokee County,* 177 N. C., 86. Unconstitutional acts of the Legislature may be rendered harmless by the courts in individual cases, when properly presented, but for the courts to strike down valid acts of the Legislature would be wholly repugnant to, and at variance with, the genius of our institutions. For this reason, every presumption is indulged in favor of the validity of an act of the law-making body. *Adkins v. Children's Hospital,* 261 U. S., 525.

Again, it should be remembered that we are dealing with a case where all other means of discipline had failed of proper results, and it is the judgment of the Legislature, as well as of the responsible authorities in charge, that, in such a case, corporal punishment should be administered as a necessary means of maintaining order and authority in the convict camps. It seems to have been the deliberate purpose of the refractory prisoner to defy the law and to challenge its authority. *Boone v. State,* 76 Tenn., 739. His conduct was highly reprehensible, and, if the statute be valid, the treatment accorded him was not unlawful. (See paragraphs 5 and 6 of statment of facts above.)

As pertinent to the instant case, the declaration of policy by the Legislature has been made in no uncertain terms, as witness the following from chapter 328, Public-Local Laws 1923, applicable to Buncombe County:

"Sec. 8. That when any prisoner or convict committed to or being worked on said roads becomes unruly, so as to make it necessary to whip said prisoner or convict, the superintendent in charge of the camp shall call in two persons of good moral character to witness the whipping, and the superintendent shall keep a record of the offense for which said prisoner was whipped, the number of blows inflicted, and the names of the witnesses present, and report the same within ten days to the commissioners of the county of Buncombe: *Provided,* no guard or other person in charge, except the superintendent, shall whip a prisoner or convict; and any superintendent who shall whip a convict or prisoner in a cruel and unmerciful manner shall be guilty of a misdemeanor and fined or imprisoned, in the discretion of the court.

"Sec. 9. That a complete record shall be kept by the superintendent in charge of all whippings, and his reports, required by this act to be made to the commissioners of the county of Buncombe, shall be filed and maintained as public records and open to public inspection."

It is conceded that if the Legislature had the power to enact this statute, containing the above provisions, then the defendant ought to be acquitted, for, with respect to the whipping administered to Lee Cody, it is admitted that he did no more than the statute allows. *McDonald v. State,* 6 Ga. App., 339. We are, therefore, face to face with the bare question as to whether "flogging," which is administered in neither a cruel nor unmerciful manner, may be employed, with legislative sanction and after fair notice, as a necessary means of discipline in the management of unruly or refractory convicts. *Westbrook v. State,* 133 Ga., 578, 18 Ann. Cas., 295, 26 L. R. A. (N. S.), 591; 21 R. C. L., 1178. We can find nothing in the Constitution which prohibits the Legislature from pursuing such a policy, and this is the only question presented by the defendant's appeal. *People v. Wright,* 40 N. Y. Sup., 285.

It ought to be observed, however, that the permission to prescribe such discipline and to administer corporal punishment, as a *dernier ressort,* is not unlimited by the statute. His Honor was in error in assuming, as it appears from his judgment he did assume, that the whole matter, including the adoption of rules, as well as their enforcement, is to be turned over to "irresponsible guards." It is expressly provided that no guard or other person in charge, except the superintendent, shall whip a prisoner or convict; and it is further provided that if any superintendent shall whip a convict or prisoner in a cruel and unmerciful manner, he shall be guilty of a misdemeanor and fined or imprisoned, in the discretion of the court.

Article XI, sec. 1, of the Constitution provides: "The following punishments only shall be known to the laws of this State, viz.: Death, imprisonment with or without hard labor, fines, removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under this State."

There are those who question the wisdom, and even the right, of the State to take life, or to inflict the death penalty, as a punishment for crime, but, in the face of the above provision and the number of electrocutions that take place annually in this State, none can deny the power of the Legislature to prescribe the death penalty. Indeed, capital punishment is a fact accomplished in North Carolina, and it is not likely to be abolished soon.

A constitutional grant carries with it the necessary power of execution, and in the absence of specific prohibition, the Legislature may employ such means of execution as, in its judgment, may seem needful, advantageous, or appropriate. *McCullock v. Maryland,* 4 Wheat, 407; *Breweries v. Day,* 265 U. S., 545.

By the same token, the power of the Legislature to prescribe imprisonment with hard labor as a punishment for crime must be conceded. This is also a fact accomplished under numerous laws of the State. But it is said that the word "only," appearing in the above quotation, prohibits any punishment not therein designated. Can it be that under this section, the State may provide for the arrest and trial of criminals, sentence them, after conviction, to "imprisonment with hard labor," and then be forced to stop with the judgment pronounced, because it has no power to execute its decrees? We cannot think so. Such a holding by this Court would be to declare unlawful every kind of prison discipline of a punitory nature whatsoever, and to announce a doctrine at once palsied and impotent, so far as the management of convicts is concerned. Even the most ardent opponents of corporal punishment as a means of prison discipline would not go so far, and yet such would be the logical result, if the Court should declare the present act unconstitutional. It would stay the hand of the Legislature in dealing with the subject of prison discipline in any manner looking to the adoption of punitory measures. "This constitutional provision has no direct application to the discipline required in our jails and penitentiaries, for if so it would prevent solitary confinement, restriction of rations, and other reasonable punishments that are in customary use in prisons and penitentiaries." *Clark, C. J.*, in *S. v. Nipper,* 166 N. C., 272.

The argument directed against the constitutionality of the act proves too much; it is like "a vaulting ambition which o'erleaps itself and falls on t'other side."

The very next sentence in the Constitution, following the one above quoted, clearly sanctions the employment of disciplinary means as a matter separate and distinct from the punishment prescribed in the judgment of the court. It says: "The foregoing provision for imprisonment with hard labor shall be construed to authorize the employment of such convict labor on public works or highways, or other labor for public benefit, and the farming out thereof, . . . *Provided,* that no convict whose labor may be farmed out shall be punished for any failure of duty as a laborer, except by a responsible officer of the State," etc.

The Legislature has interpreted this provision to mean that prison discipline of a punitory nature may be authorized and committed to responsible officers for enforcement. In consequence of this construction, we find sections 7723 and 7728 of the Consolidated Statutes conferring such authority on officials of the State prison in certain designated cases. The statute now before us, applicable to Buncombe County, was enacted in 1923. Similar statutes have been passed for other counties.

There are several expressions in our Reports to the effect that, in the opinion of some of the judges, corporal punishment by flogging cannot be upheld as a lawful practice in the absence of direct statutory authority. *S. v. Mincher,* 172 N. C., 895; *S. v. Morris,* 166 N. C., 441; *S. v. Nipper, ibid.,* 272. But even in these cases, a majority of the Court was not willing to go so far. *Hoke, J.,* writing the prevailing opinion in *Nipper's case,* said: "These statutes clearly contemplate that the control and discipline of convicts and particularly in reference to their punishment, corporal or other, shall be pursuant to rules formally made and published by the board of county commissioners, or their duly authorized agents, and I would not hesitate to hold that these rules should be humane, reasonably designed to affect the well ordered governance of convicts, and that, in their prominent features, they should be made known beforehand to each and every prisoner, that they may live and act with knowledge of the penalties attendant on disobedience. In applying such a standard, I am not prepared to say that never, under any circumstances, is corporal punishment permissible, or that carefully prepared rules, looking to such result, are, in all instances, unlawful; but the question is not presented on this appeal, for there is no proof or suggestion that there were any rules or regulations of any kind which authorized the punishment inflicted in the present case."

And in *Mincher's case, Brown, J.,* delivering the opinion of the Court, said: "The kind of punishment that may be inflicted in order to enforce obedience to discipline upon the part of convicts engaged in working the public roads of the State is a difficult problem of serious importance addressed to the wisdom of the General Assembly. . . . If the convict is returned to jail because he will not work, he accomplishes his purpose. It is what he desires, and it destroys entirely the efficiency of a sentence to hard labor upon the roads. If the convict system of working the public roads is to be maintained, some kind of summary punishment must be inflicted in order to compel the unruly convict to work and in order to enforce discipline and obedience to authority. If this cannot be done, the system may as well be abolished."

The reasons assigned by the learned trial judge for holding the present statute unconstitutional are, we think, more properly addressed to the question of policy, which is a matter for the Legislature, than to the question of power, which alone the courts may consider. We hold that the statute, here challenged, is a valid exercise of the legislative power. Any objection to its provisions, on the ground of alleged impolicy, should be addressed to the legislative branch of the government.

Let the cause be remanded with direction that a verdict of not guilty be entered on the special findings of the jury. *S. v. Moore,* 29 N. C., 228.

Reversed.

STATE OF NORTH CAROLINA, ON RELATION OF SALISBURY MORRIS PLAN COMPANY, AND THE SALISBURY MORRIS PLAN COMPANY v. JOHN McCANLESS AND CHARLES McCANLESS, ADMINISTRATORS OF N. B. McCANLESS; W. A. McCANLESS, SURETY; MRS. G. F. McCANLESS, WIDOW; JOHN McCANLESS, CHARLES McCANLESS, MRS. LENA BUSBY, MRS. MARY NORWOOD, MRS. KATE HEGE, W. F. McCANLESS, W. A. McCANLESS, MRS. CARRIE HAMMER, N. B. McCANLESS, JR., HEIRS AT LAW AND DISTRIBUTEES OF N. B. McCANLESS, DECEASED.

(Filed 26 January, 1927.)

1. Courts—Equity—Superior Courts—Jurisdiction—Actions — Executors and Administrators—Final Accounts—Clerks of Courts—Demurrer.

Under the equitable principles and the provisions of C. S., 135, confirmatory thereof, a suit may be maintained in the Superior Court to enforce a judgment against the personal representatives of the decedent after final account has been filed with the clerk of the court having jurisdiction of the administration of the estate to surcharge and falsify the final account filed therein, and a demurrer to the complaint sufficiently alleging the facts that fall within this principal on the ground that the clerk of the court had exclusive jurisdiction, is bad.

2. Same—Parties.

Held, under the facts of this case, where it is alleged that the administrators, the widow of the deceased, his heirs at law, received of the falsified final account filed with and accepted by the clerk, a benefit, by reason of which the plaintiff's judgment against the administrator remained unpaid, the joinder of the administrators personally and individually, the sureties on the administration bond, and the widow and heirs at law, was proper, and a demurrer on that ground was bad. C. S., 358, 135.

3. Pleadings—Demurrer.

Upon demurrer to the complaint only the facts alleged in the pleadings will be considered by the courts, and the additional allegations of the defendant in his demurrer will be considered as a speaking demurrer. C. S., 511(5).

4. Actions—Parties—Subject-Matter — Demurrer — Pleadings — Amendments—Statutes—Severance of Action.

An action will not be dismissed upon demurrer to the complaint on account of a misjoinder of parties and causes of action when the causes of action alleged against the several defendants grow out of a common liability, or the same subject of action or transaction connected with the same subject of action, and in proper instances the court will require the pleadings to be made more definite by amendment, C. S., 537, or the court may decide that several causes of action have been improperly joined and allow the pleadings to conform thereto upon such terms as are just, and order the action to be divided into as many actions as are necessary for the proper determination of the controversy. C. S., 516.

STATE *v.* MCCANLESS.

APPEAL from *Bryson, J.*, at May Term, 1926, of ROWAN. Reversed.

Complaint, in substance: (1) Plaintiff is a corporation doing a general Morris Plan business; (2) defendants, John and Charles McCanless duly qualified as administrators of estate of N. B. McCanless and gave bond with W. A. McCanless and J. D. Norwood as sureties. (3) The other defendants are the heirs at law of N. B. McCanless, deceased, and Mrs. C. F. McCanless, the widow. (4) On 14 July, 1923, the administrators, John and Charles McCanless, filed in the clerk's office a purported final settlement of N. B. McCanless' estate. (5) On 11 July, 1923, the plaintiff instituted an action in the Superior Court of Rowan County against John and Charles McCanless, administrators of N. B. McCanless. At May Term, 1925, a judgment was obtained against the defendants, administrators, for the sum of $4,000 and interest. (6) That on 1 February, 1922, the administrators filed with the proper State and United States officials the inheritance tax and Internal Revenue tax inventory; that the inheritance tax inventory sworn to by the administrators, filed with the clerk of Rowan County and with State Revenue Commissioner, showed that the real and personal property of the intestate, N. B. McCanless, amounted to $212,216.68. (7) That according to what purports to be the "final settlement" filed by said administrators in the clerk's office of Rowan County, personal estate aggregated $12,148.62, of which $1,114.80 refund on Federal tax. Paid to clerk for State inheritance tax $1,952.73, for U. S. $4,283.68. To calculate the tax, it was based on the personal estate of the deceased to be worth $146,065.68, after deducting debts, etc. That according to inheritance tax inventories the administrators paid to the heirs at law, including themselves, about $20,000 each. (8) That defendants, administrators, and as individuals, wrongfully and contrary to law only charged themselves with personal estate less than $11,000, and then unlawfully and wrongfully gave credit as disbursements $1,952.73 inheritance tax paid State and $4,283.68 paid the United States Government—taking nearly one-half for purpose of paying inheritance tax; paid themselves $111.48 exclusive of about $20,000 paid each; that this is all shown on purported "final settlement"; that the settlement is incorrect and not according to law and the full amount of their intestate's estate has not been accounted for. (9) That plaintiff at May Term, 1925, Rowan County Superior Court, obtained judgment against said administrators for $4,000 and interest. It was found under issue presented that the administrators did not advertise for creditors, as required by C. S., 45; that the defendants collectively and jointly are liable and indebted to the plaintiff in the amount of said judgment; that defendants, W. A., Charles and John McCanless are liable and indebted to plaintiff for amount of said judgment; that purported final

settlement filed by the administrators should be set aside, declared incorrect and void. They should be charged as individuals with amounts $1,952.73 and $4,283.68 paid by them as inheritance tax from personal estate of their intestate; that W. A. McCanless is indebted to and liable to plaintiff on the aforesaid administrators' bond to extent of said judgment. J. D. Norwood, the other surety, is insolvent and is not made a party. (10) That the sums before mentioned, $1,952.73 and $4,283, charged against the estate as inheritance taxes, and $111.48 paid to defendants as distributees should be declared assets belonging to the estate so far as the judgment is concerned and required to refund to the administrators to use and benefit of the plaintiff to the extent of $4,000, interest and cost. If defendants fail and refuse to pay into court or pay plaintiffs' judgment, then plaintiff recover an individual judgment against John and Charles McCanless, as administrators, and their surety, W. A. McCanless, to the extent of $4,000, interest and cost, and according to the terms and conditions set out in bond of administration; that plaintiff also recover a joint judgment against each of defendants to be discharged upon payment of the amount due plaintiff as heretofore stated; "that plaintiff is entitled to a joint judgment against each of the defendants, as provided by section 59 of the Consolidated Statutes of North Carolina, and is further entitled to an individual judgment against John McCanless, Charles McCanless, and W. A. McCanless, pursuant to the bond of administration filed by them in the clerk's office of Rowan Superior Court; that the defendants, John McCanless and Charles McCanless, as administrators of the estate of N. B. McCanless, having misapplied the assets of the estate of their intestate, and having failed to account for all the personal estate of said intestate, and having paid inheritance taxes as set forth in this complaint, which they should not have paid, and having failed to charge themselves up with the $20,000 paid each of the distributees, as set forth in their inheritance tax inventory, and having charged the estate the sum of $1,054.73, as commissions for administering said estate, and then having paid each of the distributees $111.48, the aforesaid commissions amounting to $1,054.73, should be disallowed and should be ordered paid into court to be applied, together with the aforesaid items, on the aforesaid judgment of the plaintiff. Wherefore, plaintiff demands judgment: (1) That it recover judgment against the defendants, John McCanless, Charles McCanless, and W. A. McCanless, on the aforesaid administration bond the sum of fifty thousand dollars to be discharged by paying plaintiff the sum of $4,000 costs and interest, and the cost of this action. (2) That it recover judgment against the defendants jointly for the sum of $4,000, cost and interest, as set out in

judgment marked Exhibit B, rendered at May Term, 1925, of Rowan Superior Court, and that each be required to pay into court his pro rata part to the extent of said judgment, and costs of this action. (3) That the purported final settlement filed by the aforesaid administrators be set aside and declared void, and that said administrators and their bondsmen be charged with the actual amount belonging to the estate of their intestate. (4) That plaintiff recover an individual judgment against each of the defendants as set forth in the complaint; for costs, and for such other and further relief to which the plaintiff may be entitled, either in law or equity."

The following judgment was rendered by the court below:

"(1) That the court has no jurisdiction of the person of the defendants or of the subject of the action for the reason that plaintiff in its complaint is seeking to collaterally attack a final settlement filed by the administrators of N. B. McCanless, deceased, in the office of the clerk of the Superior Court of Rowan County; and for the further reason that the clerk of the Superior Court of Rowan County has exclusive original jurisdiction to correct, modify, surcharge, or set aside a final settlement of administrators of a deceased.

(2) On the ground that the complaint does not state facts sufficient to constitute a cause of action for the reason that the complaint does not allege and show that demand has been made upon the administrators to correct their final settlement filed before the clerk, and that the said administrators have failed or refused to correct the same; or that demand has been made upon the clerk to set aside final settlement, or that the clerk had refused to do so; and that no exceptions or appeal have been taken before the clerk, and no notice to reopen was given either to the administrators or to the clerk of the Superior Court; and for the further reason that the plaintiff is seeking to compel contribution against the heirs of the deceased without alleging that the personal estate of the deceased has been exhausted, but, on the contrary, alleges that there is ample and sufficient personal estate to pay plaintiff's claim.

The court being of the opinion that said demurrer should be sustained, it is now, therefore, ordered and adjudged that the defendants' demurrer to said complaint be, and the same is hereby sustained, and that plaintiff's action is hereby dismissed at the cost of the plaintiff."

The plaintiff assigned error in sustaining the demurrer and dismissing the action, and appealed to the Supreme Court.

P. S. Carlton and R. Lee Wright for plaintiff.

Walter H. Woodson, John C. Busby and Hayden Clement for defendants.

CLARKSON, J. The defendants demur: (1) That the court has no jurisdiction of the person of the defendants or of the subject of the action; (2) the complaint does not state facts sufficient to constitute a cause of action.

Defendants contend as to the first ground of demurrer: That plaintiff in its complaint is seeking to attack collaterally a final settlement filed by the administrators of N. B. McCanless, deceased, before the clerk of the Superior Court of Rowan County, and that the clerk alone has exclusive original jurisdiction to correct, modify, surcharge or set aside a final settlement of the administrators.

In *Horney v. Mills,* 189 N. C., at p. 728, it is said: "If the facts alleged in the complaint, admitted to be true, upon consideration of the demurrer, and construed liberally, with every reasonable intendment and presumption in favor of plaintiff, constitute a cause of action, in favor of plaintiff and against defendant, the demurrer must be overruled; otherwise the demurrer must be sustained." *Smith v. Smith,* 190 N. C., p. 764.

In *Houston v. Dalton,* 70 N. C., at p. 664, *Bynum, J.,* held: "The allegations of the complaint present a case of equitable jurisdiction only, according to our old judicial system, and when such is the case, the action is properly instituted in the Superior Court. So a bill to surcharge and falsify an account, which is the nature of the action now before us, was always brought in the court of equity. Adams' Eq., 222; *Murphy v. Harrison,* 65 N. C., 246."

Public Laws, 1876-7, ch. 241, sec. 6, is now C. S., 135, which is as follows: "In addition to the remedy by special proceeding, actions against executors, administrators, collectors and guardians may be brought originally to the Superior Court at term time; and in all such cases it is competent for the court in which said actions are pending to order an account to be taken by such person or persons as said court may designate, and to adjudge the application or distribution of the fund ascertained, or to grant other relief, as the nature of the case may require."

Connor, J., in *Fisher v. Trust Co.,* 138 N. C., p. 98, said: "The jurisdiction of courts of equity to entertain administration suits, at the instance of creditors, devisees or legatees has been uniformly recognized and frequently exercised. Such suits are less frequent since the distinction between legal and equitable assets has been abolished and full powers in the settlement of estates conferred upon courts of probate. Whatever doubt may have existed in respect to the jurisdiction after the establishment of our present judicial system, was removed by the act of 1876, ch. 241, Code, sec. 1511 (C. S., 135); *Haywood v. Hay-*

wood, 79 N. C., 42; *Pegram v. Armstrong,* 82 N. C., 326." *Bratton v. Davidson,* 79 N. C., 423; *Shober v. Wheeler,* 144 N. C., 409; *Oldham v. Reiger,* 145 N. C., 254; *Clark v. Homes,* 189 N. C., 703.

In the present action the administrators and sureties on their bond, the administrators personally, heirs at law and distributees and widow of N. B. McCanless, are all made parties defendant. Plaintiff has obtained a judgment of $4,000 and interest against the administrators and it is unpaid. As to surety, see C. S., 358. The action is in the nature of a bill to surcharge and falsify the account. It was well settled under the old practice that an action of this kind could be brought in the court of equity. C. S., 135 (ch. 241, sec. 6, Laws 1876-7), *supra,* is in confirmation. We think the Superior Court had jurisdiction of the defendants and the subject of the action.

As to the second ground of demurrer, that the complaint does not state facts sufficient to constitute a cause of action, this cannot be sustained.

In *Bank v. Felton,* 188 N. C., at p. 385, it was held: "The contention by the defendants that the plaintiffs should have sued M. J. Felton, executor of Thomas Felton, and not the defendants, legatees and beneficiaries under the will of Thomas Felton, cannot be sustained. The record shows, and it is not disputed, that M. J. Felton was duly appointed and qualified as executor of the last will and testament of Thomas Felton. As executor, he advertised, as required by law, and, after the expiration of the year, filed a final account with the clerk of the Superior Court and settled with the legatees and beneficiaries. The suit is allowable by statute in such cases for the debts of such decedent unpaid and the extent of liability fixed. Consolidated Statutes on the subject are as follows: sections 45, 59, 60, 76 and 101."

When suit was brought against the administrators by plaintiff, at May Term, 1925, an issue was found that the administrators did not advertise for creditors as required by C. S., 45.

We can consider on a demurrer only such facts as appear in the complaint. Any other facts make it a "speaking demurrer." Such extrinsic matters cannot be considered. *Way v. Ramsey,* 192 N. C., 549; *Brick Co. v. Gentry,* 191 N. C., 636. The defendants contend that the plaintiff's complaint is in violation of C. S., 511, subsec. 5, as follows: "Sec. 511. The defendant may demur to the complaint, when it appears upon the face thereof, either that . . . (5) Several causes of action have been improperly united."

Defendants in their brief, after setting out the several alleged causes of action relied on by plaintiff, contend that they are improperly united and say: "This, briefly, is a concise statement of the alleged causes of

action that plaintiff has joined in one single cause of action in a complaint both voluminous and ambiguous."

"If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. When the allegations of a pleading are *so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.*" C. S., 537.

The causes of action are thrown together in no very logical way, but they are not demurrable as they are all bottomed on a common liability—all in some way interested in the subject of action or transaction connected with same subject of action. Under our Code the restrictions or joinder have been relieved somewhat by a liberal interpretation of the "same transaction." The modern decisions tend to freedom of joinder, and elementary restrictions on joinder of actions in both complaints and counterclaims. If any of the causes of action are good, the demurrer cannot be sustained.

In *Blackmore v. Winders,* 144 N. C., at p. 218, it is said: "Pomeroy on Rem., sec. 577: 'Where a demurrer is filed to several causes of action or to more than one defense, on the ground that no cause of action or no defense is stated, if there is a good cause of action in the one case or one sufficient defense in the other, the demurrer will be overruled as to all, and the same rule (the author says) also applies to a demurrer, for want of sufficient facts, by two or more defendants jointly; it will be overruled as to all who unite in it, if the complaint or petition states a good cause of action against even one of them.'" *Griffin v. Baker,* 192 N. C., 298.

It may be noted in cases of misjoinder, C. S., 516, is as follows: "If the demurrer is sustained for the reason that several causes of action have been improperly united, the judge shall, upon such terms as are just, order the action to be divided into as many actions as are necessary for the proper determination of the causes of action therein mentioned."

As heretofore said, the Superior Court has equitable jurisdiction in matters of this kind, as well as under C. S., 135, but it may also be noted that the concluding part of C. S., 135, is very broad and says "or to grant other relief as the nature of the case may require." This indicates elastic power. See *Killian v. Hanna, ante,* p. 17. The demurrer must be

Reversed.

E. J. ANGELO, HARRY PHILLIPS AND C. E. WALL, TRADING AS PHILLIPS MEAT MARKET; R. L. POTTER, TRADING AS STAR MARKET; J. S. MOSER, TRADING AS MOSER CASH STORE; R. E. BENNETT AND T. S. BENNETT, TRADING AS BENNETT BROTHERS; W. S. TILLEY AND E. R. LINVILLE, TRADING AS TILLEY & LINVILLE; A. L. TURNER AND M. B. WILSON, TRADING AS TURNER & WILSON; W. S. COOPER, TRADING AS SANITARY MARKET; BASKETERIA, INC.; WHITE HOUSE MARKET, INC.; E. G. SELF, J. H. MUSE, G. W. HAWKINS, C. M. WILLIAMS, J. A. LITTLE, R. S. MOSER, O. G. ALLEN, O. F. BROWN, W. E. BOWEN, A. L. KIRBY AND R. C. RIGHT v. CITY OF WINSTON-SALEM, THOMAS BARBER, MAYOR OF THE CITY OF WINSTON-SALEM, AND J. A. THOMAS, CHIEF OF THE POLICE OF THE CITY OF WINSTON-SALEM.

(Filed 26 January, 1927.)

1. **Health—Municipal Corporations—Cities and Towns — Ordinances—Markets—Perishable Goods.**

   A city in the exercise of statutory authority may enact a valid penal ordinance as affecting the health of its citizens, and under its police power, require that meats, fish, oysters and perishable matter be sold at a sanitary market building containing refrigeration and other sanitary methods, under proper inspection, where adequate accommodation may be obtained at a reasonable rental, and may exclude such business within a prescribed territory therefrom, the location of the market-house being reasonably suitable to the business or trades specified.

2. **Courts—Judicial Notice—Health—Police Powers — Perishable Merchandise.**

   The courts will take judicial notice that the sale of meats, fish, vegetables, etc., within the limits of a populous city affects the health of its citizens and falls within its police powers.

3. **Same—Constitutional Law.**

   Where in conformity with a valid city ordinance dealers in meats, fish, oysters, etc., have made sanitary provision for their sale, expending moneys, etc., for the purpose, a later ordinance which excludes their location from one prescribed does not deprive such dealer of the property rights under our Constitution, where ample means and facilities are properly provided to take care of all who may apply, and at a reasonable rental.

4. **Appeal and Error—Injunction — Evidence — Conclusions of Fact—Burden of Proof.**

   In the Supreme Court, an appeal in injunction is not confined to the facts found by the Superior Court judge upon the evidence of record, but the burden is on the appellant to show error therefrom.

APPEAL by plaintiffs from *Lane, J.*, refusing to grant permanent restraining order, 6 September, 1926, of FORSYTH. Affirmed.

This is an action instituted in the Superior Court of Forsyth County by plaintiffs, retail fresh meat and fish dealers, for the purpose of obtain-

ing an order permanently restraining the defendants from enforcing an ordinance of the city of Winston-Salem, adopted 18 June, 1926, prohibiting the sale of fresh meats or fish within a defined area of the city except at the municipal market, the ordinance to become effective on and after 1 December, 1926. From a judgment of the court below refusing such permanent restraining order, the plaintiffs assigned error and appealed to the Supreme Court.

The necessary facts will be considered in the opinion.

Wallace & Wells and Raymond G. Parker for plaintiffs.
Parrish & Deal for defendants.

CLARKSON, J. The charter of the city of Winston-Salem (chapter 180, Private Laws 1915, sec. 44), provides: "The board of aldermen shall have the power to enact ordinances in such form as they may deem advisable, as follows: . . . *To establish, regulate and control the markets or market building; to fix the location of any market building, prescribe the time and manner and place within the city wherein marketable articles, such as meats, perishable vegetables, fish, game, and all other kinds of perishable food or diet shall be bought or sold:* . . . On behalf of the general welfare of the city of Winston-Salem, and for the good order and government thereof, the board of aldermen may, in addition to the foregoing powers, pass or ordain any resolution or ordinance, and enforce the same by proper punishment or penalty, which it may consider wise or proper, not inconsistent with the Constitution and laws of the State." C. S., 2674, 2787, sec. 20, 2791, 2794.

The ordinance of Winston-Salem, enacted 18 June, 1926, is as follows: "Section 630. Adopted 18 June, 1926. B-3827.

"Be it ordained, (a) That, for the protection of the public health, and in order to facilitate inspection of fresh meats and sea-food, for the enforcement of sanitary regulations, and for the general welfare of the community, it shall be unlawful for any person to sell or offer or expose for sale at retail any fresh meats or fowl, as defined in section 499 of the general ordinances, or fish, oysters or other fresh sea-food, but not including wild game, at any place within that portion of the city hereinafter described, except at a stall or stand in the city market at the corner of Sixth and Cherry streets, duly licensed for that purpose. (b) That this section shall apply to the following territory (estimated from record by court): Such area extending approximately four-fifths of a mile from the new city market in every direction, and containing an area of 2.1 square miles. The total area of the city is 12.33 square miles. (c) That this section shall not affect or modify the provisions of sections 500 and 503 of the general ordinances, relating to the sale of fresh meats at wholesale, the sale as a whole of calves, hogs, goats or

sheep, and the sale of sausage and other meat products as therein provided. (d) That this section shall be in effect from and after 1 December, 1926."

The defendants allege and contend, in substance: That prior to 1 July, 1925, the city maintained a public market at the old city hall on Fourth and Main streets. This market had become inadequate, and the city undertook the erection of a new and adequate municipal market, completing the same 1 July, 1925, at the following cost:

Grounds	$133,787.00
Buildings	224,813.19
Equipment	88,819.56
Total	$447,419.75

This market building is splendidly designed and equipped. It is located on a lot 175 feet by 420 feet. It is built of brick and concrete, of fireproof construction. It is approximately 100 feet wide and 245 deep. The grounds are equipped with refrigerators and refrigerator counters for meat markets, an adequate number of stalls equipped as fish markets, and an adequate number of grocery and provision stalls. It also contains ample space to meet all needs for a long time to come. The offices of the meat inspectors of the city are located on the main floor of the market building. The basement of the market contains storage rooms and refrigerating and heating equipment. It contains a modern ammonia-compressor refrigerating system which will maintain low temperature in every refrigerator and refrigerator counter in the market, with which each market stand in the market is equipped. The photographs filed as exhibits, showing the exterior and interior and equipment of the market building, fully corroborate the above statements.

The market building is conveniently and centrally located. It is located as nearly in the center of the city as it is possible for it to be, on Sixth and Cherry streets, each of which are 60 feet in width, which is the width of all business streets in the city of Winston-Salem. It is within one block of the Robert E. Lee Hotel; within two blocks of the eighteen-story Nissen building, the largest building in the city; one and one-half blocks of North Liberty Street, one of the most important streets in the city of Winston-Salem, on which is located a street car line; and three and one-half blocks from the courthouse square.

The rentals for spaces in the market have been fixed by the board of aldermen at fair and reasonable rates. Efficient management has been provided for the market. Reasonable and proper ordinances for the

INTERIOR OF MARKET

purpose of maintaining the market in a sanitary condition have been adopted and machinery provided for their enforcement.

While the record does not show that existing markets in the territory affected by the ordinance in question are insanitary or are operated in violation of ordinances at present in effect, it does show that the conditions in the markets in such territory do not compare favorably with conditions in the city market, as to buildings, equipment and general sanitary conditions; that the inspection of the meat market can be much more easily and efficiently performed by the meat inspectors of the health department by reason of the fact that all markets in the central portion of the city will be located in the city market.

This market is not operated by the city for the purpose of revenue or profit, but for the purpose of protecting the health and promoting the general welfare of the city. Assuming the market operated at full capacity, there would still be a deficit to be met out of the general funds of the city.

On 18 June, 1926, the board of aldermen of the city of Winston-Salem enacted an ordinance which will after 1 December, 1926, make it unlawful to sell at retail fresh meats or sea-foods at any place within a defined area of the city except in the city market, such area extending approximately four-fifths of a mile from the new city market in every direction, and containing an area of 2.1 square miles. The total area of the city is 12.33 square miles.

This zone includes the main business and retail parts of the city. Retail meat and fish markets have been maintained in it for years, and, of course, sanitary regulations have been in effect as to such places of business for a long time. Ordinances of the city already in effect prior to 18 June, 1926, are set out in the complaint.

No licenses or permits have been issued by the city to the plaintiffs, or to any other persons to engage in the business of retail meat or fish dealers within such area after 1 December, 1926.

The court below took judicial notice of the fact that it is one of the prime duties of a municipality to protect the health of its inhabitants by means of careful inspection of perishable foods, such as meats and fish, by means of the enactment of adequate sanitary regulations and their proper enforcement; also that while particular individuals may operate meat and fish markets in an entirely sanitary manner, yet, this business in general is one which requires careful inspection and supervision or abuses will arise greatly to the detriment of the public. Practically all legislative bodies having jurisdiction over this subject have enacted such legislation.

The plaintiffs, on the other hand, allege and contend, in substance: That this action is by twenty-one market owners, who have invested

$71,134, and whose good will and going business is worth $50,000, handling fresh meat and sea-food in Winston-Salem, asking that the defendants be permanently restrained from putting into effect an ordinance of the city of Winston-Salem adopted by the board of aldermen on 18 June, 1926. The ordinance provides a zone, covering only a part of the incorporation of Winston-Salem, in which territory are the places of business of the plaintiffs, and attempts to legislate them out of business, wrecking their businesses, rendering valueless large investments and destroying their vested rights, by providing that after 1 December, 1926, no market or place of business handling fresh meat or fresh sea-food shall be carried on, except in a market building owned by the city. Prior to the adoption of the ordinance in question, the city of Winston-Salem passed the most rigid ordinances relative to the handling of such food and requiring the most up-to-date sanitary and refrigerating equipment. In accordance with these ordinances the plaintiffs invested large amounts of money and freely complied with them. Thereafter the city built a municipal building, in an out-of-the-way location, in the midst of farmers tobacco warehouses, livery stables, guano dealers and wholesale houses, away from all street car lines, some distance from the nearest jitney route, and approached by extremely narrow streets which are crowded and congested with traffic. This market building proved unpopular, the people not patronizing it. Then it was that the city desired to ruin plaintiffs by passing the ordinance of 18 June, 1926. Many citizens appeared in person before the board of aldermen and more than 11,000 (7,000 white and 4,000 colored) petitioned that the said ordinance be not enacted.

An injunction can be sought in an action of this kind and the rule is conceded by the parties to this action as set forth in *Pierce et al. v. Society of the Sisters,* etc., 268 U. S., 510, 45 Sup. Ct. Rep., 571, 69 L. Ed., 1070, known as the *School case* from Oregon: "But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this Court has gone very far to protect against loss threatened by such action. *Traux v. Raich,* 239 U. S., 33; . . . *Traux v. Corrigan,* 257 U. S., 312; . . . *Terrace v. Thompson,* 263 U. S., 197," . . . *Turner v. New Bern,* 187 N. C., 541 (concurring opinion); *Advertising Co. v. Asheville,* 189 N. C., p. 737; *Moore v. Bell,* 191 N. C., 305; *Wood v. Braswell,* 192 N. C., 588.

The court below found no facts, but "ordered, adjudged and decreed that the plaintiffs' application be and the same is hereby denied and the plaintiffs' action is hereby dismissed," and allowed a temporary restraining order until the action could be heard by the Supreme Court.

In *Wentz v. Land Co., ante,* 32, it is said: "In injunction proceedings this Court has the power to find and review the findings of fact on appeal, but the burden is on the appellant to assign and show error, and there is a presumption that the judgment and proceedings in the court below are correct." *Sanders v. Ins. Co.,* 183 N. C., p. 66; *Davenport v. Board of Education,* 183 N. C., 570.

A market-house has always been held in this State to be a necessary expense for a municipality. *Smith v. New Bern,* 70 N. C., 14; *Wade v. New Bern,* 77 N. C., 460; *Swinson v. Mt. Olive,* 147 N. C., 611; *LeRoy v. Elizabeth City,* 166 N. C., 93.

Whatever we may think of the hardship involved, the ordinance is a valid exercise of police powers vested in the board of aldermen of Winston-Salem under the decisions of this Court. The learned attorneys for the plaintiffs realize this, and in their brief say: "If this Court should be of the opinion that this case falls under the decisions of the *Perry* and *Pendergrass cases,* . . . then they should be overruled."

In *S. v. Pendergrass,* 106 N. C., p. 664, the ordinance was, "No person shall sell any fresh meats within the corporate limits of the town of Durham outside the market-house of said town: *Provided,* that this ordinance shall not apply to persons selling beef of their own raising by the quarter." A suitable and convenient market-house had been provided. This was held to be a valid exercise of the police power. The ordinance is general in its character and applies to all alike.

In *S. v. Perry,* 151 N. C., p. 661, the ordinance was as follows: "No person shall sell any fresh fish within the incorporated limits of the city of Fayetteville, outside of said market-house in said city: *Provided,* that fresh fish which are caught in the streams and waters in Cumberland County, when offered for sale in a fresh condition, shortly after they are caught, may be sold within the said city, at such places and points as may not be prohibited by law." This ordinance was held to be a valid exercise of the police power. *Hutchins v. Durham,* 118 N. C., 457; *McIntyre v. Murphy,* 177 N. C., 300.

In *Natal v. Louisiana,* 139 U. S., 621, 35 L. Ed., 293, *Mr. Justice Gray,* speaking to the question, says: "The plaintiffs in error contended in the recorder's court, and afterwards assigned for error, that their privileges and immunities as citizens of the United States had been abridged, and that they had been deprived of liberty and property without due process of law, and had been denied the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States. The case is too plain for discussion. By the law of Louisiana, as in States where the common law prevails, the regulation and control of markets for the sale of provisions, including the places and the distances from each other at which they may be kept, are mat-

ters of municipal police, and may be intrusted by the Legislature to a city council, to be exercised as in its discretion the public health and convenience may require. (Citing numerous authorities.) The ordinance of the city of New Orleans, prohibiting the keeping of a private market within six squares of any public market of the city, under penalty of a fine of twenty-five dollars, and of imprisonment for not more than thirty days if the fine is not paid, was within the authority constitutionally conferred upon the city council by the Legislature of the State."

In *Ex parte Byrd,* 84 Ala., 17, 20, 5 Am. St. Rep., 328, the Court said: "While the power 'to regulate' does not authorize prohibition in a general sense, for the very essence of the regulation is the existence of something to be regulated, yet the weight of authority is to the effect that this power confers the authority to confine the business referred to to certain hours of the day, to certain localities or buildings in the city, and to the manner of its prosecution within those hours, localities and buildings."

Supporting the principle set forth in the opinions above quoted, are McQuillin, Municipal Corporations, secs. 965, 6; Dillon, Municipal Corporations, 5 ed., sec. 705; *City of New Orleans v. Faber,* 29 So., 507, 105 La., 208; *Tomassi v. City of San Antonio,* 268, S. W., 273; *S. v. Gisch,* 31 La., Ann., 544; *City of New Orleans v. Graffina,* 27 So., 590, 52 La. Ann., 1082; *Shelton v. Mayor of Mobile,* 30 Ala., 540; *Jacksonville v. Ledwith,* 26 Fla., 163, 23 Am. St. Rep., 558, 9 L. R. A., 69; *New Orleans v. Stafford,* 27 La. Ann., 417, 21 Am. St. Rep., 563; *Ex parte Canto,* 21 Tex. App., 61, 57 Am. Rep., 609, 17 S. W., 155; *Winnsboro v. Smart,* 11 Rich Law (S. C.), 551.

In *Bizzell v. Goldsboro,* 192 N. C., at p. 354, this Court held, quoting from *S. v. Bass,* 171 N. C., 781: "An ordinance to be valid *must be uniform in its application to all citizens and afford equal protection to all alike. It must not discriminate in favor of one person or class of persons over others. To be valid it must furnish a uniform rule of action.* (Italics ours.) *S. v. Tenant,* 110 N. C., 612. It must operate equally upon all persons, as well as for their equal benefit and protection, who come or live within the corporate limits. 1 Dillon Mun. Corp., sec. 380; *S. v. Pendergrass,* 106 N. C., 664; *S. v. Summerfield,* 107 N. C., 898."

The present ordinance comes within the principle above enunciated. The ordinance is a regulation applicable to all in prescribed limits.

In *Turner v. City of New Bern,* 187 N. C., p. 541, the principle was laid down: "Under the provisions of C. S., 2787, and under the provisions of its charter authorizing a city to pass needful ordinances for

its government not inconsistent with law to secure the health, quiet, safety—general welfare clause—within its limits, etc., it is within the valid discretionary exercise of the police powers of the municipality to pass an ordinance forbidding the erection of lumber yards within a long established, exclusively residential portion, and when this discretionary power has not been abused the courts will not interfere." In the *Turner case, supra,* there were prescribed limits applicable to all. *State ex rel. Nat. Oil Works of La. v. McShane, Mayor,* 159 La., 723, 106 Sou. Rep., 252; *Bizzell v. Goldsboro, supra,* at p. 357.

In 1910, according to the United States Census, the population of Winston-Salem was 22,700; in 1920 it was over double—48,395. As a matter of common knowledge, it is increasing perhaps nearly in the same ratio. The board of aldermen has left about five-sixths of the area of the city in which the plaintiffs are yet free to locate their businesses.

The petition against the ordinance was signed by perhaps one-seventh of the present population. This large number should, and no doubt did, have persuasive, but not necessarily binding, effect on the board of aldermen. The other conditions set forth by plaintiffs should, and no doubt did, have weight with the board of aldermen. It was a hardship on plaintiffs, but the law in this State, and the great weight of authorities in the nation, under the facts and circumstances of this case, are against the contention of plaintiffs. It is to be noted that the ordinance was passed on 18 June, 1926, and went into effect 1 December, 1926. The board of aldermen realizing the hardship on plaintiffs, gave them time to close out their businesses as dealers in fresh meat and sea-food, so that if they desired they could rent places in the city market and sell fresh meat and sea-food or rent places for their businesses outside the four-fifths of a mile area from the city market.

We have taken time to consider thoroughly a so far-reaching and important matter affecting the rights of plaintiffs.

From a careful review of the decisions of this State, the United States decisions and those of other states, and from the facts and circumstances of this case, the forum of plaintiffs was with the governing body of Winston-Salem—the power was given them by legislative enactment.

The case was argued here by able attorneys on both sides and the briefs covered every phase of the contentions.

Under the law, the judgment of the court below is

Affirmed.

CLARA N. ELLIS v. W. B. ELLIS.

(Filed 26 January, 1927.)

1. Judgments—Nullity—Courts.

Where it appears from the record in the case that the judgment is void, it will be considered as a nullity by the court without life or effect given it.

2. Judgments—Consent—Contracts—Approval of Court.

A consent judgment rests by the agreement of the parties upon its subject-matter, and is given the effect of a judgment of the court in accordance with its terms, with the approval of the trial judge.

3. Same—Vacated Upon Consent.

A consent judgment being founded upon the contract of the parties may not be amended or made ineffectual by the court without like assent of the parties.

4. Same—Married Women—Husband and Wife—Deeds and Conveyances—Statutes.

While a consent judgment must be in conformity with C. S., 2515, that transfers the wife's title in her separate realty to her husband, upon her executing and delivering her deed thereto in conformity with the statutory provisions, the husband may claim title under his valid deed.

5. Same—Annuities—Estoppel.

Where by consent judgment a division of lands is made between the husband and wife under which the lands of the wife were charged with the payment of an annuity to the husband, upon the husband's motion to vacate the judgment, the wife insisting upon the validity of the judgment assumes the burden upon the lands conveyed to her, and is bound by the judgment.

6. Deeds and Conveyances—Delivery of Deed—Issues — Questions for Jury.

No title passes by a deed to lands until its delivery and acceptance, and where an issue is properly raised as to this fact, the question is one for the jury.

CIVIL ACTION, before *Bryson, J.*, at Fall Term, 1926, of FORSYTH. Remanded.

On 20 February, 1901, the defendant, W. B. Ellis, conveyed to the plaintiff, Clara N. Ellis, his wife, four lots or parcels of land described in said deed. Thereafter, prior to 25 May, 1923, the defendant undertook to take possession of said land and the plaintiff brought an action against the defendant in the Superior Court of Forsyth County, seeking to have the title to all of said property adjudged to be in herself.

At the March Term, 1925, pending the taking of testimony, the following judgment was entered: "This cause coming on to be heard, and

being heard before Michael Schenck, judge presiding, and a jury, at the March Term, 1925, of the Superior Court, Forsyth County, and pending the trial of said cause, and before the close of the evidence the plaintiff and defendant compromised and settled their differences.

"It is, therefore, by and with the consent of the parties ordered, adjudged and decreed that the plaintiff is the owner and entitled to the immediate and exclusive possession of the real estate described in the pleadings, as follows, to wit:

"The following described tract of land known as the J. A. Butner Factory property in Salem, N. C." (describing the lot).

It is further ordered, considered and adjudged and decreed that the defendant, W. B. Ellis, is the owner and entitled to the immediate and exclusive possession of the following lands or parcels of real estate set out in the pleadings and described as follows:

"Situated on Main Street in the town of Salem, N. C." (describing the lots).

It is further considered, ordered and adjudged and decreed that the lot adjudged to be the property of the plaintiff shall pay annually to the defendant W. B. Ellis the sum of fifteen hundred dollars ($1,500), payable in twelve equal installments, beginning 1 April, 1925, until 1 August, 1928, should he live so long, and thereafter said lot of land shall pay to the said W. B. Ellis the sum of two thousand dollars annually during the life of the said W. B. Ellis, payable in equal monthly installments, with the proviso, however, that should the rent on the property at the expiration of the present lease to Brown & Williamson Tobacco Company, to wit, 1 August, 1930, be increased beyond the sum of six thousand dollars ($6,000) annually, then it is considered, ordered and adjudged and decreed that the annuity to be paid to W. B. Ellis as hereinbefore recited, shall be proportionately increased, and should the rent on said property, after the date aforesaid, be reduced, then the annuity hereinbefore recited shall be proportionately reduced; in no event, however, shall the annual payments or annuity herein provided to be paid to the said W. B. Ellis be less than the sum of fifteen hundred dollars ($1,500), payable as hereinbefore set forth.

It is further ordered that should the said Clara N. Ellis, or her assigns erect a building or buildings upon the vacant portion of said lot or that part not occupied by the brick structure situated thereon, then and in that event, the annuity to be paid to the said W. B. Ellis shall not be increased by the rental value according to said property by the erection of said new buildings or structures.

It is further ordered and decreed that should the plaintiff elect to sell and convey said property within the life time of W. B. Ellis then and in that event, it is ordered that the plaintiff shall have leave to sell

and convey said property and out of the proceeds from said sale, she shall pay to W. B. Ellis, at his option, the cash value of said annuity calculated upon the rent then being paid for said building at the time of sale, the cash value of said annuity, however, when so computed, shall be on a basis of not less than two thousand dollars ($2,000), annually, or at the election of W. B. Ellis, the plaintiff shall file bond with surety to be approved by the judge of the Superior Court of Forsyth County, conditioned to pay W. B. Ellis the annuity herein provided for during the period of his natural life, said annuity payment whereof to be secured by said bond shall not be less than two thousand dollars ($2,000) annually. In the event the said W. B. Ellis shall elect to take the cash value of said annuity at the time of sale, the cash value of said annuity shall be computed according to the mortuary tables as now exists under the law of the State of North Carolina and upon security being provided as aforesaid for the payment of the annuity aforesaid, or upon the payment of cash value of said annuity as herein set forth, then in that event said property so conveyed shall be discharged of all liens and encumbrances fixed by this decree, and upon notice to both parties a supplemental decree shall be entered by the judge of the Superior Court of Forsyth County so declaring, and this cause be retained only for such orders.

It is further considered, ordered and adjudged that the property aforesaid decreed to be the property of said Clara N. Ellis shall be charged with a lien for the payment of the annuities herein set forth.

It is further ordered, adjudged and decreed that the plaintiff, Clara N. Ellis, execute and deliver to the defendant, W. B. Ellis, a deed of conveyance to all the property herein decreed to be the property of the said W. B. Ellis, which said deed shall be executed by the plaintiff and duly probated and recorded in accordance with the statutes of North Carolina regulating conveyances by married women to their husbands.

It is further ordered and adjudged that each party pay his or her own cost and that the court cost be divided equally between the parties. Michael Schenck, Judge Presiding. Approved and consented to: Swink, Clement & Hutchins, Manly, Hendren & Womble, attorneys for plaintiff. Walter E. Brock, T. L. Caudle, P. W. Glidewell, L. V. Scott and Graves & Graves, attorneys for defendant. Approved and consented to: Clara N. Ellis, W. B. Ellis.

In pursuance of said consent judgment, on 12 March, 1925, the plaintiff, Clara N. Ellis, executed a deed in fee simple to the defendant for the land designated in said consent judgment as the property of W. B. Ellis. This deed recites that it is made "pursuant to order, judgment and decree of the Superior Court of Forsyth County in a civil action therein pending entitled 'Clara N. Ellis v. W. B. Ellis.'" This deed

was duly acknowledged before a notary public and also in accordance with C. S., 2515. It further appears that the defendant has received the payments directed in said consent judgment to be paid by the plaintiff to him.

Prior to the March Term, 1926, defendant duly made a motion to vacate the consent judgment hereinbefore referred to. After hearing the motion to vacate said consent judgment, Bryson, J., entered the following judgment: "This cause coming on to be heard and being heard before the undersigned at chambers in Greensboro, N. C., on Saturday, 27 March, 1926, said hearing being by and with the consent of the parties, as appears in the record, and after hearing the evidence and the argument of counsel, the court being of the opinion that the defendant is not entitled to the relief prayed, it is ordered and adjudged that said action be and the same is hereby denied, and that the cost of this motion and hearing be taxed against the defendant, W. B. Ellis."

From the order declining to set aside said consent judgment, the defendant appealed.

Swink, Clement, Hutchins & Feimster and Manly, Hendren & Womble for plaintiff.

W. B. Ellis, in propria persona, for defendant.

BROGDEN, J. Is the consent judgment, March Term, 1925, in compromise and settlement of the differences existing between the plaintiff and the defendant void?

Unquestionably, "a void judgment is without life or force, and the court will quash it on motion, or *ex mero motu.* Indeed, when it appears to be void, it may and will be ignored everywhere, and treated as a mere nullity." *Carter v. Rountree,* 109 N. C., 29; *Moore v. Packer,* 174 N. C., 665; *Reynolds v. Cotton Mills,* 177 N. C., 412.

It will be observed that the judgment sought to be vacated is a consent judgment. "A judgment or decree entered by consent is not the judgment or decree of the court, so much as the judgment or decree of the parties, entered upon its record with the sanction and permission of the court, and being the judgment of the parties, it cannot be set aside or entered without their consent." *Harrison v. Dill,* 169 N. C., 544; *Belcher v. Cobb,* 169 N. C., 689; *Bunn v. Braswell,* 139 N. C., 135; *Bank v. McEwen,* 160 N. C., 414; *Simmons v. McCullin,* 163 N. C., 409; *Gardiner v. May,* 172 N. C., 194; *Morris v. Patterson,* 180 N. C., 484; *Distributing Co. v. Carraway,* 189 N. C., 420; *Bank v. Mitchell,* 191 N. C., 190.

At the time this consent judgment was entered, the plaintiff and the defendant were husband and wife. The plaintiff had been granted a

decree of absolute divorce from the defendant, but this decree of divorce was held to be void in the case of *Ellis v. Ellis,* 190 N. C., 418. Now, if the consent judgment is, as a matter of law, the contract of the parties, and the parties were, at the time said judgment was entered, man and wife, the law required compliance with C. S., 2515. This contract of the parties, referred to as the consent judgment, did not comply with C. S., 2515, for the reason that there is no private examination of the wife and no certificate to the effect that the contract was not unreasonable or injurious to her. Therefore, if the title to the land described in the consent judgment is vested by reason of said judgment, such title would be invalid for the reasons given. However, it appears that, after said consent judgment was rendered, the plaintiff executed a deed to the defendant for the land described therein. This deed was executed in full compliance with C. S., 2515. If this deed was delivered to the defendant, and he accepted it, defendant's title would be valid by virtue of the deed itself, and irrespective of any contract between husband and wife.

On the other hand, the plaintiff, Clara N. Ellis, holds title to all the land described in the deed from W. B. Ellis to Clara N. Ellis, dated 20 February, 1901, and duly recorded. Plaintiff, therefore, claims under the deed itself, made to her in 1901 by the defendant, and her title to her portion of the property is valid by virtue of that deed and irrespective of the consent judgment. Plaintiff, Clara N. Ellis, filed an affidavit in this cause, resisting the motion of the defendant to set aside said consent judgment and declaring that she approved the judgment, and she is in this proceeding requesting the court to enforce the judgment which carries with it the payment of the annuities prescribed therein by the plaintiff to the defendant. The plaintiff, at the time this affidavit was filed, and at the time this motion was made by the defendant, was under no disability, and her conduct in thus appearing in this cause will bar her from questioning the obligation imposed of paying said annuities. "A claim made or position taken in a former action or judicial proceeding will estop the party to make an inconsistent claim or take a conflicting position, in a subsequent action or judicial proceeding to the prejudice of the adverse party, where the parties are the same and the same questions are involved." *Holloman v. R. R.,* 172 N. C., 372; *Brantley v. Kee,* 58 N. C., 332; *Williams v. Scott,* 122 N. C., 545.

The defendant contends that the deed from Clara N. Ellis to him, dated 12 March, 1925, was never delivered to him or accepted by him. There is evidence in the record to the contrary, but this is a disputed fact, and the defendant is entitled to have this fact found by the court. If the court shall find that the deed from the plaintiff to the defendant,

dated 12 March, 1925, was duly delivered to the defendant, then the title to the respective portions of property, referred to in said consent judgment, is valid as to both plaintiff and defendant.

Therefore, this cause is remanded to the Superior Court of Forsyth County to the end that further proceedings may be had in accordance with this opinion.

It is further ordered that the cost of this appeal be divided equally between the parties.

Remanded.